NOV. 2 1882
JAMES H. MCKENNEY, CLERK

Supreme Court of the United States.

THE SOUTHERN EXPRESS COMPANY,
Appellee,

vs.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (AS REORGANIZED),
Appellant.

No. 879.

Motion to Dismiss Appeal, or for Certiorari,

AND

PETITION AND BRIEF

IN SUPPORT THEREOF.

F. E. WHITFIELD,
CLARENCE A. SEWARD,
Of Counsel for the Motion.

NEW YORK:
DOUGLAS TAYLOR, BOOK AND LAW PRINTER, 89 NASSAU ST., COR. FULTON.
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Supreme Court of the United States.

THE SOUTHERN EXPRESS COMPANY,
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Appellant.
No. 879.

And now comes the appellee, and respectfully moves the Court upon the petition hereto annexed—

I.—To dismiss the appeal herein upon the following grounds:

1. The certificate appended to the transcript is not the certificate required by law.

2. This Court has no jurisdiction of such appeal.

3. The decree appealed from was and is not final.

4. The decree appealed from was and is interlocutory or provisional only.

5. The decree appealed from does not decide all the issues between the parties, or those raised by the pleadings, and as to which the larger portion of the evidence embraced in the stipulations, and not contained in the transcript, was addressed.

6. The decree appealed from on its face leaves such issues pending and undetermined in the Circuit Court, which is proceeding to determine the same.

7. The appeal was taken before the end of the term at which such decree was pronounced.

8. Such decree was modified by the Circuit Court at the same term at which it was pronounced by a further interlo-

cutory or provisional decree, under which proceedings are still pending in said Circuit Court.

9. The said appeal was premature.

II.—And in the event that this Court shall deny such motion to dismiss said appeal, then the appellee further respectfully moves the Court that a writ of *certiorari* may be issued to bring up the portions of the record left back, and not included in the transcript, as the same are specifically set forth in the said petition.

F. E. WHITFIELD,
CLARENCE A. SEWARD,
Of Counsel for Motion.

SUPREME COURT OF THE UNITED STATES.

THE SOUTHERN EXPRESS COMPANY, *Appellee*,
vs.
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as reorganized), *Appellant*. } *No.* 879.

To the Supreme Court of the United States:

The petition of the Southern Express Company, appellee herein, respectfully represents:

I.—The transcript from the Clerk's Office of the Circuit Court for the Eastern District of Arkansas has been filed herein, and as so filed contains copies of the Bill, Preliminary Injunction Order—Answer—Supplemental Bill—Answer to Supplemental Bill—Replication—Stipulations between the parties—Motion to dissolve the Injunction—Order modifying Injunction—and Decree—and nothing more—and such transcript concludes with a certificate in these words:

"UNITED STATES OF AMERICA, }
Eastern District of Arkansas. }

I, RALPH L. GOODRICH, Clerk of the Circuit Court of the United States for the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct and compared copies of the originals remaining of record in my office.

In witness whereof, I have hereunto set my hand and the seal of this Court, this 28th day of June, in the year of our Lord one thousand eight hundred and eighty-two, and in the Independence of the United States of America the one hundred and sixth.

[SEAL,] RALPH L. GOODRICH,
Clerk."

II.—It appears from the bill in such transcript that heretofore, and prior to the 2d day of June, 1880, the Southern Express Company had been and was then in the enjoyment of all the usual express facilities upon the defendant's railway, and for a stipulated compensation which had been theretofore paid.

III.—It in like manner further appears that, on the 2d day of June, 1880, the defendant notified the express company that such facilities would be withdrawn on the 14th day of June, 1880.

IV.—It in like manner further appears that the Bill herein was sworn to on the 11th day of June, 1880, and a temporary restraining order was allowed by the Court on the same day.

V.—The said Bill prayed as follows:

"1. That a preliminary or provisional injunction may be issued against the defendant, its agents, officers, servants, and employes, restraining them, and each of them, until the further order of this Court, and particularly on the fourteenth day of June, 1880, and on any other day subsequent thereto, from interfering with or disturbing in any manner, the enjoyment by the Southern Express Company of the facilities now accorded to it by the said defendant, upon its lines of railway, for the transaction of business of the said Southern Express Company, and of the express business of the public confided to its care; and from interfering with any of the express matter or messengers of the Southern Express Company; and from excluding or ejecting any of its express matter or messengers from the depots, cars and lines of the said defendant, as the same have been heretofore, and are now, enjoyed and occupied by the said Southern Express Company; and from refusing to receive and transport, in like

manner as the said defendant is now doing, over its lines of railway, the express matter and messengers of the said Southern Express Company; and from interfering with or disturbing the business of the said Southern Express Company, or its present relations in reference thereto, with the said defendant in any way or manner whatsoever, and, so long as the said Southern Express Company shall be willing and ready, and offer to pay, according to its present contract rates with the said defendant, or such rates as shall be equal to those paid by others who are afforded the same facilities.

2. That the said defendant may be decreed by this Court to transport, at all times, the express matter, safes and messengers of the said Southern Express Company, by the same trains, and with the same accommodations thereon, and in its depots and stations as it may transport its own express matter, or as it may accord to itself; and that the said defendant may be decreed so to transport the express matter, safes and messengers of the said Southern Express Company, at and for the statutory tolls and compensation in that behalf by law provided; and that the said defendant may be decreed to make a reasonable rebate or reduction, to be fixed and determined by this Honorable Court, from its charges to the said Southern Express Company by reason of its performance of said accessorial service as above specified, so long as the said Southern Express Company shall offer to conform to all the reasonable rules and regulations of the said defendant, and to pay all lawful charges for the transaction of its said business.

3. That if any dispute or disagreement shall arise between the parties hereto during the pending of this suit and before a final decree herein, upon the question of what is a lawful or reasonable compensation to be paid by your orator to the defendant for the transportation of the express matter, your orator may be permitted to bring the same by way of interlocutory application to this Court for its decision, and that pending the inquiry thereon, the preliminary injunction heretofore prayed may be continued, to the same purport, tenor and effect as if the prayer for the same were here repeated."

The said prayers were founded upon appropriate allegations in the said bill.

VI.—As matter of fact, a temporary injunction order was granted on the return of said temporary restraining order. Such injunction order is not contained in the transcript, and the transcript is defective in that regard.

VII.—It in like manner further appears that a supplemental bill was sworn to on the 11th day of May, 1881, and thereafter duly filed. In such supplemental bill it was stated in substance that, since the original bill was filed, the railroad

company had commenced the conduct of the express business on its lines upon its own behalf, and had subjected the Southern Express Company thereafter and continuously to illegal and exorbitant rates of charge, which were specifically in said supplemental bill set forth, and which were alleged to be in excess of charges made to other portions of the public desiring express services, and in excess of the charges which the defendant credited to itself for the conduct of its own express business; that the defendant charged the express company different and illegal rates for packed parcels, and excessive and illegal rates for boxes and safes used in the transportation of valuables, and that it illegally demanded an inspection of the contents of packages as a prerequisite to the transportation thereof; that it carried in its own express department, at a less rate than it charged the plaintiff, goods received from or to be delivered to the connecting express department of the St. Louis, Iron Mountain & Southern Railway Company; that it permitted the public to aggregate its parcels, and charged them only upon the gross weight thereof, while it refused such permission to the Southern Express Company, and charged it upon each package separately; and it prayed appropriate relief thereon, and specifically that the defendant might be restrained from—

"charging the plaintiff other than at a rate which shall be a strictly reasonable compensation for transportation upon defendant's railroad, and the service necessarily performed by defendant in connection therewith * * and from charging the plaintiff more than remains after deducting from said rates the fair value of the services in the transportation of express matter usually and according to custom performed by express companies, and not usually performed by railroad companies in the transportation of freight, or by the defendant in the transportation of its general freight carried by it as a railroad carrier."

VIII.—It in like manner further appears that the defendant filed its answer to said supplemental bill. Such answer admitted substantially the allegations of the supplemental bill, and specifically averred that—

"Respondent, by its charter and the law of the State, is authorized to fix its rate for carriage."

IX.—It in like manner further appears that, on the 14th day of July, 1881, the following proceedings were had in said cause:

"This cause came on by consent to be heard in vacation upon the motion of the respondents to dissolve the injunction heretofore allowed, and the Court, having heard the arguments of counsel and being fully advised, overruled said motion.

And this cause coming on to be heard by consent upon the [ ] of complainant to modify the injunction heretofore allowed, and the Court having heard the arguments of counsel, and being advised, ordered that said injunction be and the same is modified, by adding thereto the following words, to wit:

'And the said respondent the Memphis & Little Rock Railroad Company, its servants, employees and agents, and each of them, is hereby further enjoined and restrained until the final hearing of this cause from demanding from or charging to the complainant more than a fair and reasonable compensation for the transportation of express matter, including closed packages, over its lines of railroad—such charges in no case to exceed the rate charged upon similar express matter received from or delivered to the St. Louis, Iron Mountain & Southern Railroad Company's Express, or to the Pacific Express Company.'"

X.—The Court below, on the granting of said order, delivered an opinion. Such opinion is not contained in the transcript, and said transcript is therefore defective in not so containing the same. Such opinion is reported in the *8th Federal Reporter*, p. 799, and it was in the words and figures following, to wit:

"CIRCUIT COURT, UNITED STATES,

EASTERN DISTRICT OF ARKANSAS, JULY TERM, 1881.

THE SOUTHERN EXPRESS COMPANY
vs.
THE MEMPHIS AND LITTLE ROCK R. R. CO. } *Equity.*

The complainant, an express company, has been engaged for many years in carrying on an express business over the respondent's railroad. No written contract was ever entered into between the parties; but the business was carried on without objection and upon terms mutually satisfactory until some time in the year 1880, when the railroad company asserted its own right to transact all the express business upon its

line, and attempted to eject the complainant therefrom. Upon the application of complainant, and upon the allegations contained in the original bill, a temporary injunction was, on the 21st of June, 1880, granted by the District Judge, restraining the respondent from interfering with the complainant, etc., and from preventing the complainant from carrying on the express business over said road and from enjoying the same facilities in the conduct of such business permitted to any other express company, or exercised by the respondent itself, on payment by complainant of reasonable compensation therefor.

On the 12th day of May, 1881, the complainant filed a supplemental bill by which it is alleged that respondent has engaged in the express business over its said line of railroad, and established express offices, agents, wagons, horses, etc. That the complainant has also continued in said business. It is further averred that since the granting of the injunction herein the respondent 'has continuously resorted to unlawful, unjust, arbitrary and unreasonable expedients to circumvent the force and effect of the orders and decrees of this Court on the original bill as aforesaid, and by imposition upon plaintiff of unlawful, unreasonable, unjust and discriminating terms, conditions and restrictions not imposed upon itself engaged in the express business, to destroy the plaintiff's business and competition on the defendant's road, and to accomplish indirectly that exclusion forbidden by the order of this Court in this cause.'

The supplemental bill sets forth in detail the terms and restrictions imposed upon the complainant, the principal of which is that the complainant is charged unjust and extortionate rates for the transportation of express matter. The prayer of the supplemental bill is that the injunction granted under the original bill may be modified so as to restrain the respondent from charging complainant upon its bags, safes, packing trunks, chests and boxes a higher rate than upon other freights of like weight and bulk, and from charging complainant upon other freights a higher rate than it charges for similar express matter received from or delivered to the custody of the Iron Mountain and Southern Railroad Company's Express, or the Pacific Express Company. Also from discriminating against the complainant in favor of itself or any other express company or person in the matter of rates, etc.

Upon the presentation of the supplemental bill, the respondent moved to dissolve the injunction allowed upon the original bill, and the complainant moved for a modification of the injunction, as prayed in the supplemental bill, and both motions were, by consent, set down for hearing before the Circuit Judge at St. Louis, on Saturday, the 4th day of June, 1881, and were then fully argued by counsel before him.

F. E. Whitfield and *Glover & Shepley*, for Complainant.
B. C. Brown and *J. O. Broadhead*, for Respondent.

McCRARY, *Circuit Judge*—

I will consider first the motion to dissolve the injunction. This is urged upon two grounds, to wit :

1. That the railroad company is, by it charter, possessed of the exclusive privilege of conducting the express business over and upon its own road ; and

2. That even if this were not so, the express company has no right to carry on its business upon said road without the consent of the railroad company.

Does the charter of the respondent, railroad company, confer upon it the exclusive right to carry on the express business upon its own road? The answer to this question depends upon the construction of the sixth section of this charter, which provides as follows :

'The said company shall have the exclusive right of transportation or conveyance of persons, goods, merchandise, or produce over said railroad by them to be constructed.'

This language must be construed in the light of the history of the construction of railroads in this country. When first introduced they were regarded as improved highways only, subject to be used by the general public. It was thought that any person ought to have the right to place his vehicle upon the track of a railroad and to transport his own freight upon it, upon paying toll for the use of the track, and it was considered necessary, in order to limit the use of the road and to give a particular person or company the exclusive right to operate it, that such exclusive right should be expressly reserved by law. And it was for this purpose that clauses substantially like the one above quoted were inserted in very many of the earlier, and not a few of the later, railroad charters. Experience very soon demonstrated that it was not practicable to apply to the system of railways all the principles that obtained in defining and regulating the rights of the public with respect to the common highway. Certain innovations were necessary. Certain exclusive privileges were inevitable in order to secure safety and celerity in the transportation of persons and property by the use of cars and steam-engines. One of the first of these to be generally recognized was the necessity that the operation of every railroad should be under the control of a single head. It was seen that the safety, not only of property, but of life as well, depended upon vesting in the owner of the track, or the company operating the road, the exclusive right to say what vehicles should be placed upon the track, or, in other words, the exclusive right of transportation and conveyance of persons and property over their tracks. An examination of the various railroad charters adopted by the various Legislatures of the Union will show

that this provision has been inserted in nearly all of them in one form or another. It was never intended to apply to or determine such a question as that now under consideration. It gives the railroad company the exclusive right to place cars on the track and operate them for the transportation of persons, goods, wares and merchandise. It gives no other or greater exclusive rights. It follows that the question whether the railroad company has the exclusive right to carry on the express business upon its line, and the right to eject the complainant must be determined independently of this provision.

This brings us to the question whether the express company may, as a matter of right, carry on its business upon the respondent's road. Substantially this question has recently been considered by several of the Courts of the United States, and it has been uniformly held that it is the duty of the Courts to maintain such right by granting a preliminary injunction at least until there can be a final hearing upon the merits. Such has been the ruling of Mr. Justice HARLAN on the Circuit, of Judge BAXTER of the Sixth Circuit, and of District Judges KEY, GRESHAM, TREAT, HALLETT and CALDWELL.

I am of the opinion that these decisions are sound in principle as well as of great weight as authority. They will be followed unless the Supreme Court shall otherwise decide. The guiding principles running through them all, and which should govern in determining the respective rights of the parties, are these:

1. A railroad company is a *quasi* public corporation, and bound by the laws regulating the powers and duties of common carriers of persons and property.

2. It is the duty of such a company, as a public servant, to receive and carry goods for all persons alike, without injurious discrimination as to rates or terms.

3. The business of expressage has grown into a public necessity. It is the means whereby articles of great value may be carried over long distances with certainty, safety and celerity, being placed in the hands of a special messenger who is to have the charge and care of them *en route*. The railroad companies must, in common with the public, recognize the necessity for this mode of transportation, and must carry express packages and a messenger in charge of them for all express companies that apply, on the same terms, unless excused by the fact that so many apply that it is impossible to accommodate all—a state of things not likely to occur. If it be said that this is giving to the express companies privileges not afforded to other shippers, the answer is that the nature of the express business makes special facilities for its transaction necessary; and the case is therefore properly exceptional.

4. It is not necessary now to determine whether the respondent, railroad company, may under its charter engage in the express business

and undertake to carry and deliver packages beyond its line. It is enough for the present to say that if it possesses the right to engage in the business at all, it must do so upon terms of perfect equality with all other express companies; and the Court will see that it does not take to itself any privileges in this regard that it does not extend to the complainant.

The motion to dissolve the injunction is overruled.

What has been said virtually disposes of the questions raised by the supplemental bill. The railroad company is bound to carry for the express company for a reasonable compensation, and must not discriminate against it. A Court of Chancery has power to decree a compliance with this wholesome regulation. This Court cannot for a moment sanction the proposition that the railroad company may by extortion or unjust discrimination exclude the express company from the right to conduct its business upon the railroad. I am not prepared now to fix the maximum rates to be charged for the transportation of express mattter; but I have no doubt of the power of the Court, after investigation, to do so. An order for this purpose should not, as a rule, be made until after a reference to a Master, and a report by him after a hearing.

For the present the injunction hereinbefore allowed will be modified so as to enjoin and restrain the respondent from charging the complainant for the transportation of express matter, including closed packages, more than a fair and reasonable rate—such charges in no case to exceed the rate charged on similar express matter to itself or to any other express company, or for similar express matter received from or delivered to the Iron Mountain and Southern Railroad Company's Express, or the Pacific Express Company. Ordered accordingly."

XI.—After the filing of the said bill, viz., on the 11th day of June, 1880, and the service of said injunction order, and after the defendant commenced to conduct the express business on its own behalf, the Southern Express Company continued, under the protection of said injunction, to conduct its express business over the defendant's lines, and has since continued, and is now so engaged in conducting the same, and in competition with the defendant's express department.

XII.—Since the commencement of this suit, no rate or other mode of compensation has been agreed upon or exists between the parties, fixing or determining the quantum of compensation to be paid by the Southern Express Company for the facilities enjoyed by it.

XIII.—Pending these proceedings, and as appears by the

statements hereinbefore made, a dispute arose between the parties as to the privileges to be enjoyed by the Southern Express Company under the temporary restraining order and the preliminary injunction, and as to the compensation to be paid therefor—which being called to the attention of the said Circuit Court, it made the order of July 14, 1881, hereinbefore referred to.

XIV.—It further appears by said transcript that, on the 1st day of September, 1880, a stipulation was made between the parties in the words and figures following:

"CIRCUIT COURT OF THE UNITED STATES,

EASTERN DISTRICT OF ARKANSAS.

SOUTHERN EXPRESS COMPANY

vs.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as reorganized).

In the above cause it is hereby stipulated:

1. That the Southern Express Company, complainant, may file Replications to the answer of the defendant at any time within thirty days from the date hereof.

2. That the time for taking testimony in said cause be extended to the 1st day of April, 1881, and that either party may, upon proper notice, take and file their depositions of witnesses up to and until that date.

3. That the cause be set down for hearing at the April Term, 1881, of said Court, upon the pleadings and testimony and exhibits with either, and upon the general demurrer of the defendant to complainant's bill reserved in the answer.

4. That all testimony taken by either party in the cause of the Southern Express Company *vs.* The St. Louis, Iron Mountain & Southern Railway Company, pending in the Circuit Court of the United States for the Eastern District of Missouri, may be used in and upon the hearing of this cause so far as it may be applicable; but copies of all such testimony which either party desires to use shall be copied either in writing or print and filed in this Court, before or by the said 1st day of April, 1881.

5. All technical and formal irregularities not going to the merits of the cause are hereby waived.

6. This stipulation shall be filed and made part of the record of the cause.

Signed and agreed,

September 1st, 1880.

F. E. WHITFIELD,
Counsel for Plaintiff.

B. C. BROWN,
Counsel for Defendant."

Said transcript does not contain any portion of the testimony taken by either party in the case of the Southern Express Company *vs.* The St. Louis, Iron Mountain & Southern Railway Company, pending in the Circuit Court of the United States for the Eastern District of Missouri, referred to in the fourth paragraph of the said stipulation, and the said transcript is defective in that it does not set forth the same. The decree appealed from recites that

"On this day came the parties aforesaid, and by their counsel then and there bring on this cause to be heard on the pleadings and proofs, and the same were then and there presented to the Court."

The petition of the express company filed in said Circuit Court, as is hereinafter set forth, also states:

"XII.—That afterwards the said parties took and placed on file a large amount of testimony therein, both oral and written, to be read on the hearing thereof."

The modification of said decree of April 12, 1882, hereinafter set forth, ordered the Master to use "all evidence on file in this cause * * * and to re-examine the same witnesses if necessary."

XV.—Subsequently the parties hereto made a further stipulation in said cause, which was in the words and figures following:

"IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF ARKANSAS.

THE SOUTHERN EXPRESS COMPANY, *Complainant,* *vs.* THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, AS REORGANIZED, *Defendant.*	*In Equity.*

It is agreed that upon the hearing of the above-entitled cause, the matter herein following shall be taken and considered as evidence admitted without further proof, subject alone to exceptions for competency and relevancy:

I.—That the Southern Express Company began doing business over the Memphis and Little Rock Railroad while said road was owned and possessed by a former company, which company has since ceased to operate said road.

That said express company began such business under a contract with such former railroad company—a copy of which is hereto attached—and has never since made any other contract in respect thereto with said former company or its successors, but has continued to conduct its business over said railroad under its successive managements, without further express agreement or contract, until the day when, as shown by the record, the defendant notified the complainant of its intention to do its own express business, receiving from, and paying for, express facilities afforded on said railroad by the several managements thereof according to the terms and provisions of said contract.

II.—That the whole amount of express matter ordinarily carried over defendant's road by both complainant and defendant is not more than one competent messenger could handle and care for according to the usage of the business.

III.—That the express department of the defendant is conducted as a department of its general business; that all the expenses of such department are paid by defendant, and all receipts go into defendant's treasury, and that the express department of defendant is not connected with, nor a part of, the express department of any other railroad company; that the business of such express department is under the charge and control of the general manager and other officers of defendant, and not subject to the control of the officers of any other railroad or express company.

IV.—That no connection exists between defendant and any other express company ; that at the city of Little Rock, the defendant, in the management of its express business, the Pacific Express Company, and the Little Rock, Mississippi River and Texas Railroad Company employ the same agent, who, however, is paid by each separately for services rendered to each.

V.—That the Southern Express Company, in conducting its business over the defendant's road, now and heretofore has and employs only its own officers, agents, offices, wagons, safes, messengers, and other express equipment, and does not make use of the offices, wagons, agents, messengers, safes, or other express equipment of the defendant's express department ; but declines to avail itself of their use, or to accept in its business, any service from the defendant except transportation or space on its passenger trains, and access thereto, for its express matter and its officers and messengers in custody thereof.

VI.—That for express matter carried over said railroad by the plaintiff, in the custody of its messengers, and exclusively handled by the plaintiff's employes, the defendant charges the plaintiff, without abatement, the same compensation that it charges those of the public who ship their express freight over the defendant's road, in the care and custody of, and to be hauled and handled by, the employes of the defendant's express department; and also passenger fare for messengers; and that these rates of charges are according to a tariff purporting to be the defendant's express tariff, a copy of which is, or will be, filed in the record of this case.

A copy of the tariff of plaintiff, used in its business, and upon which its charges for carriage of express matter of all kinds on defendant's road, were based, before defendant began doing an express business; a copy of tariff plaintiff established and used on same road since defendant began an express busniess; and a copy of the bill of lading given shippers by plaintiff, are hereto attached and made parts of this agreement.

VII.—That the defendant has not made, and refuses to make, any special tariff for express companies conducting an express business over its road, in the manner that the plaintiff conducts its business.

VIII.—That the defendant is engaged in precisely the same character of express business as is the plaintiff, conducting the same just as the plaintiff and other express companies, and receives and transports express matter for the public upon a bill of lading, the form and substance whereof is set out in copy thereof, hereunto attached.

IX.—The contract referred to in paragraph I. of this stipulation, was amended in respect to certain rates only, on January 14th, 1874, by the general superintendent of the Memphis and Little Rock Rail-

way Company, and the defendant has suffered the plaintiff to carry over its said road its express matter, and do an express business thereon, upon the same rates and terms as were fixed by said contract, thus amended, until the commencement of this suit. Said contract, dated May 26th, 1871, and said amendment thereto, in the form of a letter addressed, under date Jauuary 14th, 1874, by A. S. Livermore, General Superintendent, to M. J. O'Brien, General Superintendent Southern Express Company, are fully set out in copies thereof hereunto appended.

It is also stipulated that the original charter of the Memphis and Little Rock Railroad Company, and the amendments thereto, and the several mortgages of said railroad company, and the official proceedings of the said company, as the same are set out in a certain pamphlet, entitled, on its title-page, "Documents relating to the Reorganization of the Memphis and Little Rock Railroad Company, Little Rock, Ark.: W. H. Windsor, Printer and Book-Binder, 1877," or so much thereof as either party may see proper to introduce at the hearing of this cause; and also all laws, public or private, of the State of Arkansas, and provisions of the Constitution of said State relating to railroad companies, or pertinent to the issues in this cause, may be given in evidence on the trial thereof, as if the same had been duly and formally proven and certified to the Court according to the rules of law and said Court.

F. E. WHITFIELD,
Sol. for Pl'ff.

B. C. BROWN,
Sol. for Def'd't."

The said transcript does not contain a copy of either of the tariffs set forth in paragraph VI. of this stipulation. The original charter of the Memphis & Little Rock Railroad Company, and the amendments thereto, and the several mortgages of said railroad company, and the official proceedings of said company, as the same are set out in said pamphlet, entitled on its title-page, "Documents relating to the Reorganization of the Memphis and Little Rock Railroad Company, Little Rock, Ark.: W. H. Windsor, Printer and Bookbinder, 1877," and all laws public or private of the State of Arkansas, and provisions of the Constitution of said State relating to railroad companies, as referred to in paragraph IX. of said stipulation, are not contained in said transcript, and said transcript is

defective in not setting forth said tariffs and said pamphlet and laws.

XVI.—The cause, in connection with other similar ones, was argued on pleadings and proofs at St. Louis on the 7th, 8th and 9th days of February, 1882, before the full bench, composed of Associate Justice MILLER and MCCRARY, *C. J.*, and, on said hearing, the counsel for both parties relied upon the evidence in said stipulation mentioned as having been taken in the case of the Southern Express Company *vs.* The St. Louis, Iron Mountain and Southern Railway Company, and upon the said tariffs, charter, and pamphlet, and Constitution, and laws.

XVII.—The opinion of the Court was pronounced on the 21st day of February, 1882, by Mr. Justice MILLER. Such opinion is not set out in the transcript, and the said transcript is defective in that regard. It was, when so pronounced, in these words:

"IN THE CIRCUIT COURT OF THE UNITED STATES,

EIGHTH CIRCUIT.

WILLIAM B. DINSMORE, Pres. Adams Express Co., &c., *vs.* THE MISSOURI, KANSAS & TEXAS RAILWAY CO.	*District of Kansas.*
SAME *vs.* THE ATCHISON, TOPEKA & SANTA FE RAILROAD CO.	*District of Kansas.*
SAME *vs.* THE DENVER & RIO GRANDE RAILWAY COMPANY.	*District of Colorado.*
THE SOUTHERN EXPRESS CO. *vs.* THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO.	*Eastern District of Missouri.*
THE SOUTHERN EXPRESS CO. *vs.* THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY.	*Eastern District of Arkansas.*

MILLER, *Circuit Justice:*

In these cases, argued before me at St. Louis, with Judges McCrary and Treat, I can do no more than present certain general conclusions at which my mind has arrived in regard to the propositions argued by counsel:

1. I am of the opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.

That while it is not possible to give a definition in terms which will embrace all the classes of articles so usually carried and to define it

with precision by words of exclusion, the general character of the business is sufficiently known and recognized as to require the Court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads.

That the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage, which to a greater or less degree attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise and the like.

2. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it, and to refuse permission to this agent to accompany these packages on steamboats or railroads on which they are carried, and to deny them the right to the control of them while so carried, is destructive of the business and of the rights which the public have to the use of the railroads in this class of transportation.

3. I am of the opinion that when express matter is so confided to the charge of an agent or messenger, the railroad company is no longer liable to all the obligations of a common carrier, but that when loss or injury occurs, the liability depends upon the exercise of due care, skill and diligence on the part of the railroad company.

4. That under these circumstances there does not exist on the part of the railroad company the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners or by the express carrier.

5. I am of the opinion that it is the duty of every railroad company to provide such conveyance by special cars, or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business.

If the number of persons claiming the right to engage in this business at the same time, on the same road, should become oppressive, other considerations might prevail ; but until such a state of affairs is shown to be actually in existence in good faith, it is unnecessary to consider it.

6. This express matter and the person in charge of it should be carried by the railroad company at fair and reasonable rates of compensation ; and where the parties concerned cannot agree upon what that is, it is a question for the Courts to decide.

7. I am of the opinion that a Court of Equity in a case properly made out has the authority to compel the railroad companies to carry

this express matter, and to perform the duties in that respect which I have already indicated, and to make such orders and decrees, and to enforce them by the ordinary methods in use necessary to that end.

8. While I doubt the right of the Court to fix in advance the precise rates which the express companies shall pay and the railroad companies shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and after it is rendered, to ascertain the reasonable compensation and compel its payment.

9. To permit the railroad company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance or at the end of every train, would be to enable them to defeat the just rights of the express companies, to destroy their business, and would be a practical denial of justice.

10. To avoid this difficulty, I think that the Court can assume that the rates, or other mode of compensation heretofore existing between any such companies, are *prima facie* reasonable and just, and can require the parties to conform to it as the business progresses, with the right to either party to keep and present an account of the business to the Court at stated intervals, and claim an addition to, or rebate from, the amount so paid.

And to secure the railroad companies in any sum which may be thus found due them, a bond from the express company may be required in advance.

11. When no such arrangement has heretofore been in existence, it is competent for the Coort to devise sŏme mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to master, etc.

12. I am of opinion that neither the statutes, nor constitutions of Arkansas or Missouri, were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the rights of the express companies."

XVIII.—It further, in like manner, appears that, on the 12th day of April, 1882, the following further proceedings took place in said cause:

"UNITED STATES OF AMERICA, }
Eastern District of Arkansas. }

Be it remembered that, at a Circuit Court of the United States of America, in and for the Eastern District of Arkansas, begun and holden on Monday, the 10th day of April, Anno Domini one thousand eight hundred and eighty-two, at the United States Court Room, in the City of Little Rock, Arkansas, the Honor-

able Henry C. Caldwell, District Judge, presiding, and holding said Court, the following proceedings were had, to wit:

'APRIL 12, 1882.

'And now on this day come the parties aforesaid, and by their counsel then and there present, bring on this cause to be heard on the pleadings and proofs, and the same were then and there presented to the Court, and the arguments of counsel for the respective parties was heard, and the said cause is then and there submitted, and due deliberation having been thereupon had, it is by the Court ordered, adjudged and decreed, as follows:

1. That the express business, as fully described and shown in the record, is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized so as to require the Court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

2. That it has become the law and usage, and is one the necessities of the express business, that the property confided to an express company for transportation should be kept while in transit in the immediate charge of a messenger or agent of such express company.

3. That to refuse permission to such messengers or agents to accompany such property on the steamboats or railroads on which it is so carried, and to deny to them the right to the custody of the property while so carried, would be destructive of the express business, and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property, so under the control of such messengers or agents.

4. That the defendant, its officers, agents and servants have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's company; or to demand a knowledge of the contents thereof; nor to refuse transportation thereof, unless such inspection be made, or such knowledge be afforded.

5. That it is the duty of the defendant to carry the express matter of the plaintiff's company, and the messengers or agents in charge thereof, at a just and reasonable rate of compensation; and that such rate of compensation is to be found and established as a unit, and is to include, as well, the transportation of such messengers and agents as of the express matter in their custody and under their control.

6. That, on and subsequent to the 1st day of May, 1877, the said defendant afforded to the said plaintiff all the facilities needed by it for the conduct of its express business over the defendant's lines, and such as are specifically in the bill herein set forth; that thereafter the

defendant notified the plaintiff that such facilities would be withdrawn, and that it was the intention and purpose of the defendant to exclude the plaintiff's company from its lines from and after the 21st day of June, 1880; that such intention and purpose were restrained by the preliminary injunction order of this Court, which said injunction order was afterwards modified as appears in the record.

7. That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent, and upon the same trains that said defendant may accord to itself, or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to plaintiff, and on its passenger trains.

8. That the plaintiff keep and render a monthly and true account of the services performed for it by the defendant, and pay therefor at the rate hereinafter specified on or before the 15th of each month, after the date hereof, for the business of the month preceding, and that the defendant has no right to require prepayment for such express facilities or payment therefor at the end of every train, or in any other manner than is hereinafter provided, and that the plaintiff execute and deliver to the defendant a bond in the sum of $25,000, conditioned well and faithfully to make such payments as are herein provided, and with surety to be approved by a Judge of the Court.

9. That it is, and was the duty of the said defendant to afford, and to have afforded, such facilities to the plaintiff as herein specified for a just and reasonable compensation.

10. Whereas, it is alleged by complainant that, since the commencement of this suit and the service of the preliminary order of injunction herein, the defendant has, in violation of said injuction and of the rights of complainant, made unjust discriminations against the complainant, and has charged the complainant unjust and unreasonable rates for carrying express matter; therefore, it is ordered that complainant have leave hereafter to apply for an investigation of this and similar allegations, and for such orders in respect thereto as the facts, when ascertained, may justify, and for the appointment of a Master to take proof and report thereon.

11. That the defendant, its officers, agents, servants and employes, and all persons acting under their authority, be and they hereby are permanently and perpetually enjoined and restrained from interfering with or disturbing in any manner the enjoyment by the plaintiff of the facilities provided for in this decree to be accorded to it by the said defendant upon its lines of railroad, or such as have been heretofore accorded to it for the transaction of the business of the plaintiff, and of the express business of the public confided to its care, and from inter-

fering with any of the express matter or messengers of the plaintiff, and from excluding or ejecting any of its express matter or messengers from the depots, trains, cars or lines of the said defendant, as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff, and from refusing to receive and transport in like manner as the said company is now transporting, or as it may hereafter transport for itself, or for any other express company over its lines of railway the express matter and messengers of the said plaintiff, and from interfering with or disturbing the business of the said plaintiff in any way or manner whatsoever—the said plaintiff paying for the services performed for it by the defendant monthly, as herein prescribed, at a rate not exceeding fifty per centum more than its prescribed rates for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation, or for private individuals—reserving the right to either party hereto to apply to this Court, according to the rules of equity proceedings, for a modification of this decree as to the measure of compensation herein prescribed.

12. It is further ordered, adjudged and decreed that the defendant pay the costs to be taxed herein, and that an execution or fee bill issue therein, and that the defendant enter herein its prayer for appeal, which prayer is granted."

XIX.—The said decree is the one appealed from to this Court.

XX.—The said decree was pronounced at the April Term for the Eastern District of Arkansas, which is appointed by law to commence on the second Monday of April, and which said second Monday occurred on the 10th of April, 1882—and on such day as appears by the recital in said decree the said Term did actually begin.

XXI.—At the same April Term of 1882, to wit, on the 6th day of June, 1882, the Southern Express Company, as appears by the certified copy herewith filed, presented its petition to the said Circuit Court in the words and figures following, to wit:

"In the Circuit Court of the United States Eastern District of Arkansas—In Equity. April Term, 1882.—The Southern Express Company, a corporation and citizen of the State of Georgia, complainant, *vs.* The Memphis and Little Rock Railway Company (as reorganized), a corporation and citizen of the State of Arkansas, defendant.

In the matter of the reference authorized by the decree of the Court in the above-mentioned cause entered at the present Term of the Court, and on the day of April, 1882.

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Arkansas—in Equity:

I.—The said Southern Express Company, your petitioner, respectfully states that it was and is the plaintiff in the above-entitled cause and filed its original bill therein on the 21st day of May, 1880.

II.—That in and by said bill it averred and set forth its existence as a corporation and a citizen of the State of Georgia and the existence of the defendant as a corporation and a citizen of the State of Arkansas, and that both said plaintiff and defendant were common carriers, as particularly mentioned in said bill, which is here referred to as part of this petition.

III.—That in said bill it was stated that plaintiff had for several years previous to the filing thereof enjoyed the privileges and franchises of its charter as an express carrier over the road of defendant, and desired a continuance of such enjoyment.

IV.—But that said defendant had notified plaintiff that after May 26th, 1880, it should not continue its business on said road.

V.—That afterwards, May 15, 1880, the defendant notified your petitioner that it had determined to transport all express matter and transact all express business over said road itself and on its own account, and through and by its own officers and agents, on and after the 1st day of June, 1880.

VI.—And said plaintiff in its said bill further stated it was informed and believed that the said railroad company intended to exclude it and its express safes and messengers from said railroad, and refused to accord to it after said June 1, 1880, any facilities or accommodations for its express business, and that such exclusion would take place unless restrained by order of the Court, and that if it did take place the plaintiff's business over said railroad would be not only irreparably injured, but absolutely destroyed. That its customers and patrons would be lost, its good will and its ability to keep its contracts with other railway and express companies terminated, and its usefulness to the public as its servant destroyed.

VII.—That the plaintiff averred further in its said bill that it was its daily custom to make, with its own horses and wagons and drivers, for whose fidelity it was responsible, all the collections and deliveries of express freight, as between the public and the railroad of defendant, which the public could not conveniently make on its own behalf, and did not require from defendant, and for which the defendant had no lawful right to charge.

VIII.—And said plaintiff further averred in its said bill that it was lawfully entitled to demand and receive from defendant the same facilities and accommodations for transacting the express business over

its lines as might be accorded by defendant to itself, and to have its express matter transported by defendant at rates or tolls specifically provided by law and the charter of the defendant and the Railroad Commissioners, and on the same trains, and with like accommodations at the depots and stations which defendant might accord to itself in the transportation of express matter by it, and for reasonable compensation, and in the event that defendant should, during the pendency of this suit or afterwards, undertake to do an express business of its own, it should deduct from charges made by it for transportation of express matter for the plaintiff a just and reasonable compensation for the accessorial service rendered by plaintiff beyond and off the lines of said railroad in the collection of goods from shippers or consignors, and delivering to consignees by means of horses and wagons, &c., and which service the plaintiff did not need or require to be done by defendant, but performed for itself. And said plaintiff offered in said bill to pay to defendant lawful and reasonable rates in its business, and to comply with all reasonable rules of defendant in that behalf.

IX.—And in said bill the plaintiff prayed the Court to enjoin the defendant, its officers, agents, servants and employes, until the further order of the Court, from interfering with or disturbing the enjoyment by the plaintiff of the facilities then accorded to it in the transaction of its business, from interfering with any of the plaintiff's express matter or messengers, from excluding or ejecting any of the express matter or messengers from the depots, cars or lines of defendant's road then enjoyed and occupied by it, from refusing to receive and transport the plaintiff's express matter and messengers as it was then doing, and from disturbing the existing business relations between said plaintiff and defendant.

X.—That on the hearing of the plaintiff's motion for a preliminary injunction therein, the Court, after argument for defendant as well as plaintiff, did then and there order that the defendant, its officers, agents, servants and employes, be enjoined and restrained until the final determination of said cause from preventing the plaintiffs enjoying the same facilities in the conduct of its express business permitted to any other express company, or exercised by the defendant itself on payment by plaintiff of reasonable compensation therefor, and defendant then and there had notice thereof.

XI.—That afterwards, on the 21st of July, 1880, the said defendant filed its answer to said bill, and thereby denied that it was its duty to accord to plaintiff any facilities previously allowed to it on its passenger trains, or at its stations or depots, or such facilities as it accorded to itself ; claimed an exclusive right in itself to do all express business over its road, and to exclude the plaintiff and all other express companies from its road, and a right to charge and collect any rate it saw

fit. Denied that it was bound to receive and transfer freights and passengers from connecting or intersecting railroads; denied that it was bound to make a reasonable deduction for service rendered by the plaintiff and not by itself to shipments off of its road from its charges against like shipments when it rendered the same service; and denied the right of plaintiff to have any space on its cars for carrying its express matter, or to carry such matter in the charge of plaintiff's employes, or to have its messengers ride in defendant's cars in charge of its express matter.

XII.—That afterwards, on the day of , the plaintiff filed its general replication to said answer, and afterwards the said parties took and placed on file a large amount of testimony therein, both oral and written, to be read on the hearing thereof.

XIII.—That on November 6th, 1880, the Court, on the motion of the plaintiff, modified the said preliminary injunction so as to make it read as follows:

'The defendants, its agents, employes and servants, are hereby enjoined until the final determination of this suit from preventing the plaintiff from enjoying equal facilities in the conduct of its express business with those permitted to other express companies, or exercised by the defendant itself with respect to such business, on payment by the plaintiff of reasonable compensation for such services as may be rendered in that behalf by the defendant. And it is further ordered that the defendant be enjoined from including under the term "reasonable compensation" any accessorial charges, and from making any discrimination against the plaintiff for the return of empty kegs or packages, and from charging the plaintiff higher rates of freight than are charged against other express companies, and than it exacts for the services of its own express department. The said rates as to the plaintiff are not to exceed those now established by the defendant for like service for other parties, or for the conduct of its own express department. It is further ordered that the defendant be enjoined from preventing the transportation of express matter by the plaintiff over the defendant's road, and from requiring as a condition or prerequisite to such transportation the listing or disclosure by plaintiff of the contents of the packages by plaintiff presented to the defendant for transportation, and from preventing the messengers of the plaintiff, on payment of passenger fare, from like accommodations for the care and custody of plaintiff's shipments as are accorded to messengers of other express companies, or the agents, servants and employes of the defendant engaged in like service.'

And the defendant then and there had notice of such modified injunction.

XIV.—Your petitioner further states that afterwards, to wit, March 25th, 1882 [April 12th, 1882], such proceedings were had in said cause that the same came on to be heard and was heard, and thereupon the Court entered therein its decree in the words and figures following:

[Being the decree of April 12th, 1882, hereinbefore set forth.]

All of which, among other things therein, will more fully and at large appear, reference being had to the record and proceedings in said cause.

XV.—Your petitioner now here respectfully prays the Court to grant to it the benefit of the reference authorized by Sections V. and X. of said decree so entered in said cause March 25th, 1882 [*i. e.*, April 12th, 1882].

XVI.—Your petitioner respectfully states that after the making of the said orders of injunction by the Court and notice thereof to the defendant, and during the pendency of the said bill, the said defendant refused to carry any express matter of said plaintiff on its railroad cars and trains at a just or legal rate of compensation therefor, but demanded and exacted from plaintiff and required it to pay, as a condition precedent to said transportation, excessive exorbitant, unreasonable and illegal rates, and plaintiff did pay such excessive, exorbitant, unreasonable and illegal rates, to its great wrong and injury.

2. That during the whole period last mentioned the said defendant refused to carry the plaintiff's messengers in charge of its express matter on its railway cars and trains at a just and reasonable or legal rate of compensation, but demanded and exacted from the plaintiff and compelled the plaintiff to pay and plaintiff did pay, as a precedent condition to the transportation of such messengers in charge of plaintiff's express matter, excessive, exorbitant, unreasonable and illegal rates of compensation therefor, to its great wrong and injury.

3. That during the whole period aforesaid the said defendant discriminated against the plaintiff in respect to its charges for transportation of the plaintiff's messengers in charge of its express matter on defendant's railway cars and trains, denying to plaintiff's messengers the same accommodations extended by it to its own messengers and to others, charging it for the transportation of its messengers as aforesaid higher rates of transportation than it charged its own and others, and compelled plaintiff to pay the same as a precedent condition to such transportation, to its great wrong and injury.

4. That during the whole period aforesaid, the defendant unjustly discriminated against plaintiff in this: that it carried express matter for itself and others at less rates than it demanded from plaintiff and compelled plaintiff to pay for like service, to its great wrong and injury.

5. That during the whole period aforesaid, the said defendant

unjustly discriminated against the plaintiff in this: that it included in its charges against plaintiff for transportation of its express matter, and compelled the plaintiff to pay to it, compensation, for accessorial service to shipments of express matter off and beyond its railroad cars and trains, not rendered by defendant, but in fact rendered by plaintiff, and just as if defendant had rendered said service, to the great wrong and injury of the plaintiff.

6. Your petitioner states that from and after the day of , 1881, and down to March 25th, 1882 [*i. e.*, April 12], the defendant unjustly discriminated against the plaintiff in this: that it refused to allow plaintiff to do its express business over all its trains and express cars, and suffered the plaintiff to do its business only on some of its trains and express cars, thereby putting the plaintiff's express matter twelve hours or more behind the defendant's express matter and that forwarded by it for other persons, thereby driving plaintiff's customers away from it, destroying the good-will and favor of the public for plaintiff, and in so far destroying plaintiff's business, to the great wrong and injury of plaintiff.

7. That during the whole period from the granting of said injunction and notice thereof to defendant, down to the 25th of March, 1882 [*i.e.*, April 12], defendant unjustly discriminated against the plaintiff in this: that it charged plaintiff and compelled it to pay, as a precedent condition to transportation of its express matter a greater amount on shipments for a less distance than it exacted and collected for the transportation of the same class and quantity of goods from plaintiff and others for a greater distance, and compelled the plaintiff to pay the said unreasonable and illegal charges, to its great wrong and injury.

8. That during the whole period aforesaid the defendant unjustly discriminated against the plaintiff in this, that it charged the plaintiff and compelled it to pay a greater amount as compensation for transportation of plaintiff's express matter over portions of its road than it charged and compelled the plaintiff and others to pay for transportation of similar quantities of the same class of express matter over other portions of its road of equal distances, to the great wrong and injury of the plaintiff.

9. That said defendant in all and each of the wrongs and injuries above-mentioned disobeyed and violated the injunction of the Court in that behalf, in contempt of the authority of the Court, and to the great wrong and injury of the plaintiff.

10. And in conformity to the terms of said decree, your petitioner respectfully prays that it be referred to a Master in Chancery *pro hac vice* in this particular case to investigate, examine and report to the

Court, as provided in said decree and by the rules of the Court, what is now and has been since the filing of the said plaintiff's bill a reasonable rate of compensation to be paid to said defendant by plaintiff for transporting plaintiff's express matter and messengers in custody and charge thereof on the railway trains and cars of defendant, and affording to plaintiff all necessary and reasonable facilities and accommodations for conducting its business in that behalf, the same to be found and established as a unit, including transportation and accommodations for both the express freight and messengers of plaintiffs, as aforesaid; also to investigate, examine and report as aforesaid as to the allegations of wrong and injury aforesaid, and for the purposes aforesaid to use all evidence taken heretofore in said cause and on file therein, both oral and written, and to re-examine the same witnesses, if necessary, and any other witnesses to be produced by the parties, and to conduct the proceedings before him at such times and places as he may designate, and to state an account of the express business conducted by plaintiff over defendant's lines from the filing of plaintiff's said bill, to the 25th day of March, 1882 [*i. e.*, April 12, 1882], and what amount plaintiff has paid to the defendant on account of transportation of express matter and messengers and accommodations extended to it by defendant during the time last mentioned, and what amount, if any, has been paid to the defendant in that behalf in excess of a reasonable and legal compensation therefor, and what damages the plaintiff has sustained by the wrongs and injuries as aforesaid alleged, and to report to the Court all the evidence received by the said master and all his actions and doings.

And as in duty bound, your petitioner will ever pray.

U. M. & G. B. Rose,
Solrs. for Petitioner.

C. A. Seward,
F. E. Whitfield,
Of Counsel."

XXI.—At the same April Term of 1882, to wit, on the 6th day of July, 1882, the Circuit Court modified the said decree of the 12th of April, 1882, as appears by a certified copy of said modification herewith filed, and which copy is in the words and figures following:

"Now, on this day came the parties, and the petition of the plaintiff filed herein having been fully considered by the Court, it is ordered that there be referred to John M. Rose, Esq., as Master *pro hac vice* to investigate, examine and report to the Court under the said decree of April 12, 1882, pursuant to the rules of the Court in such cases provided.

1. What was during the period between the injunction order herein of June 21, 1880, and the 12th day of April, 1882, the rate actually enforced by the defendant against plaintiff for carrying its express freight over, and what price in addition thereto, if any, it charged for the fares of messengers in charge of said freight, and state an account showing said rates and fares between said dates and the amounts thereof respectively.

2. What were the statutory rates for carriage of ordinary freights by said defendant during said period, and state an account of the same as applied to express freight transported by the defendant for said plaintiff during said period as if the same were ordinary freights.

3. What was during the same period a reasonable compensation to be paid by plaintiff to the defendant for allowing plaintiff all reasonable and proper facilities for conducting plaintiff's business over defendant's road, cars and lines, the same to be found as a unit, including compensation for the transportation both of plaintiff's express matter and messengers in the custody and control thereof; also what amount during the same period the plaintiff was required to pay and has paid to the defendant in that behalf, and if the amount so paid by plaintiff has exceeded such reasonable compensation, to state an account thereof.

4. Whether, during the said period, the defendant included in its charges for transportation of express matter for plaintiff's charges, also for accessorial service not performed by said defendant, but performed by plaintiff for itself. Under the term accessorial service, as herein used, the Master will include only the cost and expenses of collecting and delivering express matter to the respective railroad depots or stations for transportation by defendant on its road and cars, and of delivering such express matter on the arrival of the same at the place of destination to the consignees thereof at any other place than at its depots or stations respectively.

5. Whether, during the period aforesaid, the defendant required plaintiff to pay, and plaintiff paid, for transportation of its messengers in custody of its express matter other than usual passenger fares, and whether, during the same period, defendant has discriminated against plaintiff by transporting express messengers other than plaintiff's at less rates than it compelled plaintiff to pay, and if so to state an account of the excess paid by plaintiff over either of said rates.

6. And whether, during the same period, defendant discriminated against plaintiff by charging and compelling plaintiff to pay for transportation of its express matter higher rates and greater amounts than it charged others for the same and similar service, and if so, to state an account of the amount of money by means of such discrimination so

paid or required to be paid by plaintiff above the rates so allowed to others than plaintiff for such service.

7. Whether, during the period aforesaid, the defendant discriminated against the plaintiff by refusing to allow plaintiff to conduct his business on any of defendant's lines, trains and express cars in use during said period in which defendant and others conducted an express business while plaintiff was so excluded, and whether by such exclusion plaintiff and its business, its express matter and messengers, were hindered and delayed, and plaintiff was thereby prevented from competing with the defendant and others conducting an express business over said lines, and if so, what damages, if any, were sustained by plaintiff in its business, and state an account thereof.

8. It is further ordered that, for the purpose of the reference hereby directed, the Master is to use all evidence on file in this cause and any other produced by the parties, and re-examine the same witnesses, if necessary, and any other witnesses produced by the parties, and conduct the proceedings before him at such times and places as he may designate, on due notice to the respective parties, and report his findings and all the evidence before him."

XXII.—Thereafter and on Saturday, October 21, 1882, by an order appearing in the minutes and records of said Court and of said date, the said April Term of 1882 of the said United States Circuit Court for the Eastern District of Arkansas, the Honorable Henry C. Caldwell, District Judge, presiding therein, was adjourned *sine die*.

XXIII.—Your petitioner avers, as it is advised and believes, that the said certificate so appended to said transcript is not the certificate required by law; and it suggests as diminutions apparent upon the face of the said transcript, that it does not contain a copy of the opinions of the Court filed in the case as required by Rule Eight of this Court; and that it does not contain the evidence referred to in the said stipulations or any part or portion thereof, as the same has been hereinbefore specified.

Wherefore, your petitioner prays:

I.—That the said appeal may be dismissed, by reason of the insufficiency of the certificate to the said transcript.

II.—That the said appeal may be dismissed upon the further following grounds:

1. Because this Court has no jurisdiction of said appeal.

2. Because the decree appealed from was and is not final.

3. Because the decree appealed from was and is interlocutory or provisional only.

4. Because the decree appealed from does not decide all the issues between the parties or those raised by the pleadings, and as to which a larger portion of the evidence referred to in said stipulation and omitted from said transcript was addressed.

5. Because the decree appealed from on its face leaves such issues pending and undetermined in the Circuit Court, which is proceeding to determine the same.

6. Because the appeal was taken before the end of the Term at which such decree was pronounced.

7. Because such decree was modified by the Circuit Court at the same term at which it was pronounced by a further interlocutory or provisional decree, under which proceedings are still pending in said Circuit Court.

8. Because said appeal was and is premature.

III.—And in the event that said appeal should not be dismissed, then that a writ of certiorari may be issued by this Court, directed to the Clerk of the said Circuit Court of the United States for the Eastern District of Arkansas, to bring up the portions of the record of said cause left back, and not included in the transcript as hereinbefore specifically set forth.

Your petitioner has caused copies of the foregoing motion, and of the notice of motion hereunder given, and of your petitioner's brief in support hereof, which is hereto annexed, to be duly served according to the rules of this Court upon the counsel in this Court for the appellant herein, and hereby annexes proof of such service.

And your petitioner prays for such other or further or different relief as to the Court may seem meet.

THE SOUTHERN EXPRESS COMPANY,
By HENRY B. PLANT,
President.

F. E. WHITFIELD,
CLARENCE A. SEWARD,
Of Counsel.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

HENRY B. PLANT, being duly sworn, deposes and says that he is the President of the Southern Express Company, the

petitioner herein, that he has read the foregoing petition, and that the matters and things therein contained are true to his own knowledge, except as to the matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

HENRY B. PLANT.

Sworn to before me this day of November, 1882.

JOSEPH GUTMAN, JR.,
[L. S.] *United States Commissioner, Southern District of New York.*

SUPREME COURT OF THE UNITED STATES.

THE SOUTHERN EXPRESS COMPANY, *Appellee,*

vs.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), *Appellant.*

No. 879.

To B. C. BROWN, Esq.,
Of Counsel for the Memphis & Little Rock Railroad Company (as Reorganized), Appellant.

SIR,—You will please take notice that on Monday, the 18th day of December, 1882, a motion, of which a copy is hereto annexed, together with a petition, of which a copy is also annexed, and a brief in support of said motion and of the prayer of said petition, of which brief a copy is also hereto annexed, will be presented to this Court at the opening of its session on that day, or as soon thereafter as counsel can be heard, and the said Court will then and there be asked on behalf of the appellee, and upon the grounds in said motion and petition stated, and for the reasons in said brief assigned, to grant said motion and the prayer of the said petition, and to dismiss the appeal herein; or, in default of its so doing,

that a writ of certiorari issue herein; and also to then and there accord to the appellee such other or further or different relief as to the Court may seem meet.

Dated November 15th, 1882.

Yours respectfully,

F. E. WHITFIELD,
CLARENCE A. SEWARD,
Of Counsel for Motion.

UNITED STATES OF AMERICA, }
Eastern District of Arkansas, } ss.:

, being duly sworn, deposes and says that, on the day of November, 1882, he personally served upon B. C. Brown, Esq., at the City of Little Rock, Arkansas, a copy of the foregoing motion and petition as the same are hereinbefore printed, and also a copy of the two briefs hereto annexed, by delivering all of such copies to and leaving the same with him personally.

Sworn to before me, this }
day of November, 1882. }

[L. S.] *United States Commissioner.*

SUPREME COURT OF THE UNITED STATES.

THE SOUTHERN EXPRESS COMPANY, *Appellee*, *vs.* THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), *Appellant.*	*No.* 879.

BRIEF IN SUPPORT OF THE FOREGOING MOTION AND PETITION.

I.

Upon the question whether the decree of the 12th of April, 1882, was or was not a final decree, the appellee respectfully refers to the brief already filed by it in the case of the Southern Express Company *vs.* The St. Louis, Iron Mountain and Southern Railway Company, being No. 914 upon the docket of the present Term of this Court—a copy of such brief having also been served upon the counsel for the appellant in this suit, as appears by the affidavit of service hereto annexed, and a copy of which brief is also hereto attached.

II.

The only remaining questions are as to the certificate appended to the transcript, and the diminution in the record suggested by the petition which the petitioner asks, in the event of the motion to dismiss being denied, may be corrected by a writ of certiorari to be addressed to the Clerk of the Circuit Court for the Eastern District of Arkansas.

AS TO THE CERTIFICATE.

Section 698 of the Revised Statutes, provides as follows:

"Upon the appeal of any cause in Equity * * * a transcript of the record as directed by law to be made, and copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the Supreme Court."

The phrase "a transcript of the record as directed by law to be made" must have some meaning. The inquiry arises, What law directs how the transcript shall be made?

This inquiry is answered in part by Rule 8 of this Court, which provides as follows:

"2 In all cases brought to the Court by writ of error, or an appeal to review any judgment or decree, the Clerk of the Court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed with the case.

3. No cause will hereafter be heard until a complete record containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this Court shall be filed."

The necessary inference from these provisions would seem to be that the clerk below must transmit a copy of the opinion or opinions filed in the case, together with a complete record containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to a hearing in this Court, and that this Court will not exercise its jurisdiction as an appellate tribunal until a record containing what is specified in these provisions shall have been filed.

But the phrase "as directed by law to be made" may have a still further interpretation. There were provisions of law existing at the date of the adoption of the Revised Statutes which may be yet in existence under a strict interpretation of the phrase "a transcript of the record as directed by law to be made." The Act of March 3, 1803 (2 U. S. Stats., 244), required

"That upon such appeal a transcript of the libel, bill, answer, depositions and all other proceedings of what kind soever in the cause, shall be transmitted to the said Supreme Court."

The Act of February 26, 1853 (10 U. S. Stats., 163), provided that

"In equity and admiralty cases, only the process, pleadings and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the Court and regularity of the proceedings, shall be entered upon the final record, and in case of an appeal copies of the proofs and of such entries and papers on file as may be necessary on the hearing of the appeal may be certified up to the appellate Court."

The first part of this last provision was reproduced in the Revised Statutes as Section 750.

It would seem, therefore, to be necessary that the Clerk below should certify that the transcript which he sends up contains a transcript of the "bill, answer, depositions, and all other proceedings of what kind soever in the cause," and also "copies of the proofs," if such copies of the proofs exist in other form than that of depositions—as, for instance, an exhibit of a charter, of a tariff, or other documentary evidence introduced in the Court below.

If the certificate of the Clerk is required to contain the substance of what has been stated, the certificate in the present case is fatally defective. It simply certifies as follows:

"I, * * , Clerk of the Circuit Court * * hereby certify that the foregoing writings annexed to this certificate are true, correct and compared copies of the originals remaining of record in my office. In witness whereof, &c."

This is not a compliance with either the rule of the Court or the provisions of the statute, and if the certificate be literally interpreted, it certifies only to the correctness "of the foregoing writings," which are contained in the transcript, which is but a fragmentary part thereof—all the pleadings, stipulations, agreements, and other matters therein contained being in print.

If the certificate be defective in not certifying that the transcript contains "a transcript of the record as directed by law to be made, and copies of the proofs," then the further inquiry arises, what is the remedy therefor? That was answered by the opinion of this Court in the case of *Hodges* v. *Vaughan* (19 *Wall.*, 12), in which a certiorari was moved for upon the alleged diminution that the Clerk of the Court below had not appended to the transcript his certificate that the transcript contained the full record. The motion for the certiorari was denied, and leave was granted to the plaintiff in error to withdraw the transcript to enable him to apply to the Clerk of the Court below to append thereto the necessary certificate. In this case the motion was made on behalf of the plaintiff in error for the certiorari, and the relief granted was accorded him.

It is supposed that the appellee is entitled to the same relief, or that if not, it will be competent for this Court, upon this branch of the motion, to direct the appellant to withdraw the transcript to enable it to apply to the Clerk of the Court below to append thereto the necessary certificate. If this is

done, the defect will be cured, and it is immaterial at whose suggestion it is done, provided that the expense thereof falls upon the party whose duty it is to furnish a properly certified transcript.

AS TO THE CERTIORARI:

The proceedings had in the Court below, as set forth in the transcript on file and in the petition, make repeated references to testimony and proofs taken in the progress of the cause and before the making of the decree of April 12th, 1882.

The fourth clause of the first stipulation found in the transcript refers to depositions taken in another cause to be filed as proof in this. The decree of April 12th recites that the cause was brought on to be heard "on the pleadings and proofs." The petition of the Southern Express Company filed in the Court below on the 6th day of June, 1882, states that the parties had taken and placed on file in said cause a large amount of testimony; and the modification of the decree of April 12th, ordered the Master to use all testimony on file.

The petition, for greater caution, enumerates the defects which exist in the transcript as filed, viz., that it does not contain the opinions of the Courts below, or the evidence or proofs upon which the case was heard in the Court below. Until, however, it is known what may be the result of the first branch of the motion, if it should be granted, and the manner in which the Clerk of the Court below shall have complied with the same, a motion for a writ of certiorari might seem to be premature. But, as the diminutions alleged clearly exist on the face of the transcript on file, and as Rule 14 requires that motions for a certiorari shall be made at the First Term of the entry of the cause, there did not seem to be any other safe mode of procedure to be pursued by the appellee than to apply to the Court, as it has done, for the issuance of a writ of certiorari to bring up the part of the record left back, and not included in the transcript.

III.

The appeal should be dismissed; or, if the Court should be of opinion that the decree appealed from is a final decree, then a writ of certiorari should be allowed to ensure the per-

fection of the record, so that the cause can be intelligently heard by this Court.

The Court will notice that the decree appealed from in the present case was made on the 12th of April, 1882, at the April Term of the Court, and that the petition of the appellee was filed in the Court below, on the 6th day of June, 1882, and the further decree modifying the decree was made on the 6th day of July, 1882, both of said days being in the said April Term, which did not adjourn until the 21st day of October, 1882.

F. E. WHITFIELD,
CLARENCE A. SEWARD,
Of Counsel for Motion.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 55.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Appellant.

against

WILLIAM B. DINSMORE, President of Adams' Express Company,
Respondent.

No. 26.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, *Appellant.*

against

THE SOUTHERN EXPRESS COMPANY,
Respondent.

No. 22.

MEMPHIS & LITTLE ROCK RAILWAY COMPANY,
Appellant.

against

THE SOUTHERN EXPRESS COMPANY,
Respondent.

BRIEF FOR APPELLANTS.

JAMES O. BROADHEAD,
B. C. BROWN,
MORGAN & McFARLAND,
JOHN F. DILLON,
SIDNEY BARTLETT,
WAGER SWAYNE,
For Appellants.

C. G. BURGOYNE'S "Quick" Print, 146-150 Centre St., N. Y.

IN THE

Supreme Court of the United States.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Appellant,
No. 321.
AGAINST
WILLIAM B. DINSMORE, President of Adams' Express Company,
Respondent.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY,
Appellant,
No. 260.
AGAINST
THE SOUTHERN EXPRESS COMPANY,
Respondent.

MEMPHIS & LITTLE ROCK RAILWAY COMPANY,
Appellant,
No. 238.
AGAINST
THE SOUTHERN EXPRESS COMPANY,
Respondent.

BRIEF FOR THE APPELLANTS.

Statement in Iron Mountain Case.

Abstract of Bill. On the 21st day of May, A. D. 1880, the complainants filed their bill in this cause, averring

that they were an express company—a corporation organized under the laws of Georgia—and had for a long time been doing an express business over the roads of the St. Louis, Iron Mountain & Southern Railway Company, under which name it was doing business by virtue of a consolidation of the St. Louis & Iron Mountain Railroad Company, the Cairo & Fulton Railroad Company, and the Cairo, Arkansas & Texas Railroad Company, formed on the 16th day of May, 1874; that the nature of the express business was peculiar; that said business was largely beneficial to the public and profitable to the express company, and that it was such business as could not be performed by the defendant, and that "no railroad company has ever had the ability to assume, as between itself and the public, such obligations for the transportation of such matter as are universally assumed by the express companies towards all who treat them with frankness."

That this business has been carried on by the complainant under the provisions of two contracts; one dated April 30, 1872, and made between the St. Louis & Iron Mountain Railroad Company and the Adams Express Company, and the other dated February 1, A. D. 1874, made between the Cairo & Fulton Railroad Company, of Arkansas, and the Cairo, Arkansas & Texas Railroad Company, of Missouri, and the Southern Express Company, of Georgia.

That the Adams Express Company and the Southern Express Company continued, after the consolidation of the railroad companies aforesaid, to enjoy the rights, privileges and facilities granted by the two contracts until about the 1st of April, 1878, when the Adams Express Company, with the assent of defend-

ant, relinquished to the Southern Express Company the transaction of the express business over so much of the lines of defendant's road as had been embraced in the contract of the 30th of April, 1872, with the Adams Express Company, and thereafter the express business over all the lines was done by the Southern Express Company; that, relying upon these contracts and the obligations imposed upon the defendant by law, the complainant has made large expenditures and afforded facilities to the public, and has built up a large and profitable business.

That the complainant has furnished wagons, horses, iron safes and other conveniences to collect and deliver express freight to the railroad; that the duty is imposed upon the defendant to always afford to complainant, as one of the public, the means and facilities of forwarding and transporting in the manner established by the usage of the express business upon reasonable terms its express matter and messengers.

By the terms of the first contract with the Adams Express Company it might be terminated by either party by giving thirty days' notice of its desire to discontinue the same.

And by the terms of the last contract it might be terminated by either party by giving sixty days' notice of its desire to withdraw from the same.

On the 26th March, 1880, defendant gave notice to complainant of its desire and conclusion to terminate the contract of 1874 at the end of sixty days from that date. And on the 23d of April, 1880, defendant gave notice of its desire and conclusion to terminate the contract of 1872 thirty days from April 26, 1880.

Complainant further averred that it was the inten-

tion of the defendant, on the 1st day of June, 1880, to exclude complainant and its express safes and messengers from its railway lines, and to refuse to accord the facilities and accommodations theretofore accorded to them, and asked for an injunction to restrain them, and to compel it to accord to complainant the like facilities and accommodations as it had heretofore enjoyed; and also asked that defendant be required to deduct from the charges to be made by it to the public a just and reasonable compensation for the accessorial service rendered by the Southern Express Company off the lines of railway in the collection of goods from shippers or consignors, and the delivery of goods to the consignees. Complainants further averred that the injury threatened would be irreparable; that the law did not afford adequate remedy; and that the interposition of a court of equity was necessary to avoid multiplicity of suits. The bill then prays for an injunction prohibiting the defendant from interfering with its business as heretofore carried on; from excluding express matter or express messengers from the cars of defendant; and from interfering with the existing relations of the companies; also prays that if, pending this suit, any dispute should arise as to what is reasonable compensation for transportation, the matter may be brought before the Court and decided; that the defendant may be required to transport the express matter of complainant and its messengers for the statutory tolls as provided by law; and that defendant be required to make a reasonable rebate or deduction, to be determined by the Court, for accessorial service performed by the express company, and for general relief.

The first injunction order was made on the 21st of May, 1880, by which defendant was enjoined from preventing the plaintiff enjoying the same facilities in the conduct of its express business permitted to any other express company, or exercised by the defendant itself on payment to the plaintiff of reasonable compensation therefor (see Record, p. 29).

On the 15th of October, 1880, complainant filed a further PETITION FOR MODIFICATION OF THE INJUNCTION (see p. 40 of Record), in which plaintiff sets out more specifically its claims as an express company, from which it appears that the claim of the express company is substantially as follows: That a railroad shall furnish them a separate car, or a given space in a car, on all passenger trains which may be run once, twice or oftener each day, as they may designate, and that they shall be allowed their messenger to accompany such freight; that the car and freight shall be surrendered up to this agent during the transportation of such freight, by him to be controlled both in the receipt and in the distribution of such freight at any and all stations and depots of the railroad; that such messengers or agents shall have access to all or any space in the depot buildings; that the railroads shall charge them less than individuals, either by direct deduction or by a system of rebates; that they shall be charged tonnage rates and not parcel rates; that they shall pay according to weight and not according to value; —that they should not be required to pay in advance, or at the end of the service as individuals do, but monthly upon their own estimates; that these dis-

criminations should be made in their favor as against individuals, so that express freight may be brought to them for profit; which being heard was granted by the Court (see Record, p. 52) to the following effect, viz:

That defendant be enjoined until the final termination of the suit, from preventing plaintiff from enjoying equal facilities in the conduct of its express business with other express companies, or exercised by defendant in respect to said business, on payment of a reasonable compensation; from making any discriminations against plaintiff for the return of empty packages, and from charging plaintiff higher rates than are charged other express companies, and that it exacts for the service of its own express department; from preventing the transportation of express matter by plaintiff over defendant's roads, and from requiring as a prerequisite the listing or disclosure of the contents of packages presented for transportation, and from preventing plaintiff's messengers on the payment of passenger fare from like accommodations, for the care and custody of plaintiff's shipments as are accorded to messengers of other express companies, or the agents or employees of defendants engaged in like service.

Answer. To the original bill full answer was made (see Record, p. 29) denying the claims set out by the plaintiff, admitting the contracts as set out in the bill, and their termination by notice as provided for by the terms of the contracts themselves, and averring the fact that the defendant had thereupon undertaken to do the express business on their roads, and were then doing such express business in the same manner, and affording equal facilities to the public in the transaction of such express business as had been afforded by the plaintiff, and offered the same rights, privileges and rates to the plaintiff in the transaction of its express

freight, that it had offered to other shippers and consignors, and that defendant was willing and offered to transport all the freight and express matter of complainant at reasonable rates, and to give complainant the same facilities and privileges that it granted to any other express company or to any other person in like circumstances, and denied that it ever excluded or demanded the right to exclude the plaintiff's express freight from the lines of its railway. Defendant in its answer claims the right to have control of express matter in the spaces of its express cars selected by itself, and under the supervision, care and control of its own employees, and denies the right of complainant to have allotted to itself any particular space in defendant's express cars for its exclusive use, or permit its messengers to ride in the express cars and to take charge of complainant's express freight; denies any right to compensation for accessorial service, &c., &c.

Much proof was taken by both parties and a decree rendered by the Court at the March Term, 1882, as follows:

Decree.

It is by the Court ordered, adjudged and decreed, as follows (Record, p. 54):

I. That the express business, as fully described and shown in the record, is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized so as to require the Court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

II. That it has become the law and usage, and is one of the necessites of the express business, that the

property confided to an express company for transportation should be kept while in transit in the immediate charge of the messenger or agent of such express company.

III. That to refuse permission to such messengers or agents to accompany such property on the steamboats or railroads on which it has to be carried, and to deny them the right to custody of the property while so carried, would be destructive of the express business and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents.

IV. That the defendant, its officers, agents and servants have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's company, or to demand a knowledge of the contents thereof, nor to refuse transportation thereof unless such inspection be granted or such knowledge afforded.

V. That it is the duty of the defendant to carry the express matter of the plaintiff's company, and the messengers and agents in charge thereof, at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit, and is to include as well the transportation of such messengers or agents as of the express matter in their custody or under their control.

VI. That on and subsequent to the first day of April, 1878, the said defendant afforded to the said plaintiff all the facilities needed by it for the conduct of its express business over the defendant's lines, and such as were specifically provided for in the contracts in the bill herein set forth; that thereafter the defendant notified the plaintiff that such facilities would be withdrawn; and that it was the intention and purpose of the defendant to exclude the plaintiff's company from its lines on and after the 25th day of May, 1880; that such intention and purpose were restrained by the preliminary injunction order of the Court, which said injunction order was afterwards modified, as appears in the record.

VII. That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent, and upon the same trains that said defendant accords to itself or to any other company or corpora-

tion engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to plaintiff on all its passenger trains.

VIII. That the plaintiff keep and render monthly a true account of the services performed for it by the defendant, and to pay therefor at the rate hereinafter specified on or before the fifteenth of each month after the date hereof for the business of the month preceding, and that the defendant has no right to require prepayment for said express facilities, or payment thereof at the end of every train or in any other manner than is hereinafter provided; and that plaintiff execute and deliver to the defendant a bond in the sum of one hundred and fifty thousand dollars ($150,000), conditioned well and faithfully to make such payments as is herein provided, and with surety to be approved by a judge of the Court.

IX. That it is and was the duty of the said defendant to afford and to have afforded such facilities to the plaintiff herein specified for a just and reasonable compensation.

X. Whereas, it is alleged by complainant that since the commencement of this suit, and the service of the preliminary order of injunction herein, the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against complainant, and has charged complainant unjust and unreasonable rates for carrying express matter, therefore it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a Master to take proof and report thereon.

XI. That the defendant, its officers, agents, servants and employees, and all persons acting under their authority be, and they hereby are, permanently and perpetually enjoined and restrained from interfering with or disturbing in any manner the enjoyment by the plaintiff of the facilities provided for in this decree, to be accorded to it by the said defendant upon its lines of railway, or such as have been heretofore accorded to it for the transaction of the business of the plaintiff and of the express business of the public confided to its care, and from interfering with any of the express matter or messengers of the plaintiff, and from exclud-

ing or ejecting any of its express matter or messengers from the depots, trains, cars, or lines of the said defendant as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff, and from refusing to receive and transport in like manner as the said defendant is now transporting, or as it may hereafter transport for itself or for any other express company over its lines of railway, the express matter and messengers of said plaintiff, and from interfering with or disturbing the business of the said plaintiff in any manner whatsoever; the said plaintiff paying for the services performed by it for the defendant monthly, as herein prescribed, at a rate not exceeding fifty per centum more than its prescribed rates for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation, or for private individuals; reserving to either party a right at any time hereafter to apply to this Court, according to the rules in equity proceedings, for a modification of this decree as to the measure of compensation herein described.

It is further ordered, adjudged and decreed that the defendant pay the costs to be taxed herein, and that an execution or a fee bill issue therefor.

The same decree was made in all three of the cases now on appeal.

Memphis & Little Rock Case.

The case against the Memphis & Little Rock Railroad Company was instituted shortly after the case against the Iron Mountain Road,—the bill being filed on June 11, 1881.

The bill in the Memphis & Little Rock Railroad case embraced the same grounds of complaint. The same orders were taken in both cases, and the same injunctions issued.

The proof by agreement was to be used in both cases and, as above stated, the same decree was rendered.

The Missouri, Kansas & Texas Case.

The remaining case of William B. Dinsmore vs. The Missouri, Kansas & Texas Railway Company, went off upon demurrer. This bill substantially embraces the same grounds of complaint, and the same decree was rendered as in the other two cases.

A decision in one case will cover all the cases in their general outlines and essential principles.

Assignment of Errors.

First. It is error to hold that express freight should be kept while in transit in the immediate charge of messengers or agents of express companies, and to take the custody of the same from the officers and agents of the railway company.

Second. It is error to hold that the officers and agents of railroads have not the right to open or inspect any of the packages or express matter which may be offered to them for transportation by express companies, or demand a knowledge of the contents and value.

Third. It is error to hold that the rate of compensation for express matter should be found and established as a unit, including the fares of messengers with the transportation of the matter.

Fourth. It is error to hold that defendant had not the right to refuse to carry complainant's express matter, and to exclude complainant from its cars at any time; or that complainant had the same right to transportation over the defendant's road as defendant had; or that defendant could not have the exclusive right of transportation against any competing carrier over its own road.

FIFTH. It is error to hold that defendant should not collect pay for transporting complainant's express matter at the end of each trip, and that it should be collected monthly.

SIXTH. It is error for the Court to make injunction perpetual against defendant, until it has been judicially established that the rates charged by defendant are unreasonable, and that if the rates are unequal that they are necessarily unreasonable; and that it is error in the Court to fix a rate in advance of the service performed; and that an inflexible rule fixing the rate at not exceeding fifty per centum more than defendant's prescribed rates, is error. The compensation decreed is wholly inadequate.

SEVENTH. It is error to hold that all freight should be estimated by its tonnage and not by packages; and that the value of the freight should not enter into the charge of transportation.

EIGHTH. It is error in holding that the Court below may retain the case for the purpose of hearing complaints which may arise hereafter in regard to measure of compensation for transporting the goods of complainant.

NINTH. It is error to assume that a court of equity has jurisdiction over the case stated in the bills, or any power by mandatory injuction or decree to enforce the common law obligations of a common carrier.

TENTH. It is error to hold that a contract determinable by its own provisions, can constitute the foundation of a usage binding between the parties after the termination of a contract.

ELEVENTH. It is error in the Court to have decreed in favor of the complainant in this cause. The decree should have been one dismissing the bills of complaints with costs.

ARGUMENT.

Railroads are public highways and railway companies are common carriers.

This proposition in its general scope is admitted by the decisions of the Courts as well as by the statutes and constitutions of the different States.

But to say that the public can require of Railway Companies other burdens than those imposed by their charters, or that the Courts can by judicial legislation create new obligations which they never assumed when they were formed, is to claim that the State is entitled to another and further consideration than that which moved it to grant the charter in the first instance, and is, in fact, a consideration which the State has never demanded, but is an additional servitude which the Courts are asked to impose without authority of law.

That railroads are necessary to the commercial growth and progress of the country, and perhaps to the existence of the nation, have come to be trite sayings, but nevertheless true. It is to the interest of the public that railroads should not be destroyed. The principles of the decree threaten with destruction the capital invested in them.

An important question is, what is the capacity of the railroad? and another question is, how is that capacity to be filled?

The public is entitled to be served, and the invested capital to be reasonably compensated. To do this the

capacity of the road is to be filled. It may not be completely filled, but it may be as nearly as possible. How is that to be done? Certainly not by making the rates on all articles equal and uniform.

From St. Louis the company sends south a carload of valuable goods, such as cloths and silk; returning, the company brings back a carload of lumber and stone; this is necessary to fill the productive capacity of the road. There must be some equalization of the cost of transportation. It will not do to bring down the cost of silks to lumber, or raise the cost of lumber to silks; for as soon as you undertake to establish that rule you destroy the business of the road. The road must fill its capacity, for the public interest demands it and the public must be served.

Hence, in order that the road may carry coal, lumber, stone and heavy articles of transportation, it must carry them at a very small per cent. When it carries lighter articles in smaller parcels and of great value, it must demand a larger rate. The main point is, by filling the earning capacity of the road the public is served and the road made remunerative to the owners. These principles are well known to railroad men and recognized by nearly all legislation upon this subject; hence the classification of rates.

Many elements enter into this classification, value, bulk, rapidity of transportation, handling, risk, amount for transportation and the condition of the road with its grades, etc. The problem is necessarily complex and not judicial in its nature.

If these causes involved the destruction of the express business we should not be heard advocating the reversal of the decree below, except upon the question

of charges to the express company for the services and facilities which it demands.

But the case involves nothing of the kind. It is entirely a question as to which of the two parties shall render this service to the public and receive the emoluments—the railroad company which built and operates the road, which must keep it in repair and operation, or an express company which has contributed nothing towards the building and contributes nothing toward the repairs, maintenance or operation of the road.

The first question is: Are express companies on the defendant roads which are doing their own express business, commercial necessities?

That a number of railroad companies are and for years past have been doing, at reduced rates and with increased revenues, the express business over their own lines, excluding all competitors and giving satisfaction to the public, is not only proven by the testimony, but is part of the current history of the country of which judicial notice is taken. That railways in England have always adequately done this business for themselves and to their own profit is so well known as scarcely to require statement.

It can matter nothing to any shipper not interested as stockholder in the one party or the other, the service being properly rendered, and at the same price, whether it is done by the one or the other.

It is pertinent at this point to give an extract from a note of Judge REDFIELD, found at p. 70, Vol. 2, American Railway Cases:

"We have often felt and expressed the regret that it, the express business, was not from the first kept more

under the control of the railroad companies in this country as it is in England and upon the continent of Europe. There is an injustice to the shareholders in railway companies in allowing these express companies to absorb so large an amount of the net earnings of the companies for the transaction of the proper business of the companies and which they might transact themselves at a very slight additional expense, and thus have a very large proportion of that income for distribution among their own shareholders which is now diverted into other channels without any additional advantage to the public, and we sometimes fear with positive detriment; for if these express companies are to be allowed a monopoly of the business upon all railway lines in the country where they choose to establish themselves, there will be constant increase of prices and a proportional decrease in accomodations.

"That is inevitable as long as human nature remains the same, and if the profits of the business goes into the hands of a few persons, or as is sometimes the case, in a single one. When the avails go into the treasury of a very extensive railway company with numerous shareholders, the temptation to exorbitant exactions is so far diminished as to be comparatively harmless."

The evidence in this case demonstrates what has been so well said by Judge REDFIELD, since it has been shown thereby, that express rates have been reduced nearly one-third since the defendant companies have undertaken to do their own express business, and that the public has been as well, if not better, served now than at any past period of express service.

That a railway company may do a carrying business beyond the termini of its own road, and issue bills of lading which will guarantee the holder against loss or damage to shipments arising off the line of the company issuing the same, is a doctrine settled by the judgment of this Court in the case of Railway Company vs. McCarthy, 96 U. S. R., 266. It is held that railway corporations, unless forbidden by their charters,

have the power to contract for shipments the entire distance over their own and any connecting lines.

The same doctrine was held in the case of the Railroad Company vs. Pratt, 22 Wallace, 123, in which the Court says, that this principle is so well settled in this country that a further citation of authorities is unnecessary.

See also, Brice *Ultra Vires*, 2d Edition, p. 9; 1st Edition, p. 673.

Harvey vs. Railroad Company, 124 Mass., 421.

Redfield on Carriers, p. 157.

If, for the performance of such contracts, defendant must employ the services of a connecting carrier, so too must plaintiff. By its own showing plaintiff cannot complete the carriage of a parcel from Atlanta, Georgia, to Washington, D. C., save by availing itself of the services of a connecting carrier. It does no business north of Lynchburg, Virginia, and other points named, and at those points delivers its freights for completion of its contract of carriage to the Adams Express Company.

In making its contract for shipment and delivery, the plaintiff in its bills of lading or receipts makes the same stipulations as to liability that are usually contained in the contracts of other transportation companies.

The bill of lading given by plaintiff to all shippers (set out on p. 1133 of the transcript) contains the following:

"And if the same is entrusted or delivered to any other express company or agent (which said Southern Express Company are hereby authorized to do), such

company or person shall be regarded exclusively as the agent of the shipper or owner, and as such alone liable, and the Southern Express Company shall not be, in any event, responsible for the negligence or non-performance of any such company or person."

Said contracts have been sustained, and delivery to a connecting carrier is held to be a discharge of the contracting express company.

See Collender vs. Dinsmore, 55 N. Y., 200.
American Express Co. vs. Second National Bank, 69 Pa. St., 394.

II.

The decree rests upon no statute obligation or common law duty of the defendant companies.

If it be true that so far as the public is concerned it can be served as well by the defendant as by the plaintiff, by a railroad company as by an express company, upon what recognized principle of law is the express company entitled to the privileges claimed by it in this suit? Such claims must be maintained either under a statutory right or in the absence of statute by common law right. We propose now to show that these rights asserted by the plaintiff fall under neither one of these heads.

The facilities of this character claimed by the plaintiff are particularly set forth in the 3d and 4th para-

graph of their supplemental bill (see p. 41 of the Record), as follows:

3. Said Court, in granting the said injunction, intended, as your petitioner is advised and believes, and therefore charges, to secure to your petitioner the full enjoyment of all needful express facilities over the line of the said defendant's railway, as your petitioner had theretofore enjoyed the same, or as the said petitioner was then enjoying or might thereafter enjoy the same.

4. The facilities then being enjoyed by your petitioner consist in free access to the vehicles containing express matter, to the stations and cars of the said defendant, the transportation thereof in the custody of messengers, and, when necessary, in safes and packing trunks or chests in baggage cars, and by passenger trains, and in the collection, unless prepaid, of the express charges due thereon from consignees thereof at the time and place of delivery thereof, and in the payment to the defendant by your petitioner of the amounts due from it for such facilities according to the terms of the contract in said bill set forth, to wit: "On or before the 10th day of each month for the business of the preceding month."

The decree sustains these claims in their full amplitude.

THE CONSTITUTION OF MISSOURI, adopted in 1875, provides:

That railways and railroad companies are common carriers, and that the General Assembly shall pass laws to correct abuses and to prevent unjust discrimination and extortions in the rates of freight and passenger tariffs on the railroads of the State, and shall from time to time establish maximum rates and charges for the transportation of passengers and freights on such railroads, and enforce them by adequate penalties.

See Sec. 14, Art 12. See Appendix to this Brief.

THE STATUTE OF MISSOURI provides that railroads are public highways, and railroad companies common carriers, and that no railroad company or corporation shall make any discrimination in charges or facilities in the transportation of freight or passengers between transportation companies and individuals, nor in the transportation of freight between commission merchants or other persons engaged in the transportation of freight and individuals in favor of either by abatement, drawback or otherwise, nor make any preference between said parties in furnishing cars or motive power for such purposes.

See Sec. 821 Revised Code of Missouri fo 1879, set out in full in the Appendix hereto.

The statute of Missouri further provides that every railroad corporation in the State shall give public notice of the regular time of starting and running its cars, and furnish sufficient accommodation for all passengers, baggage, mails and express freight as shall, within a reasonable time previous thereto, offer for transportation at the place of starting, at the junction of other railroads and at other stopping places, and they are required to stop all trains carrying passengers a sufficient length of time to allow transfer of baggage, passengers, mails and express freight.

See Sec. 797 Revised Code of Missouri, 1879, printed in Appendix.

THE CONSTITUTION OF ARKANSAS provides that no discrimination in charges or facilities for transportation shall be made between transportation companies and individuals or in favor of either, by abatement, drawback or otherwise, and no railroad or canal company shall make any preference in furnishing cars or motive power.

See Art. 17, Constitution of Arkansas, printed in Appendix.

Statutes of KANSAS. See M. K. & T. Record, pp. 88, 89.

It will be seen by these provisions of the constitutions and statutes of Missouri and Arkansas that transportation companies are allowed no privileges over individuals either in rates or in the mode or convenience of transportation. It is needless to say that express companies are transportation companies and come within the letter and spirit of these provisions.

If the contention of plaintiff is right, if it is law, it is law for all persons and for all courts.

There now exist numerous transportation companies, called, generally, "Fast Freight Companies," and these have the same rights as the express companies. They, too, have obtained facilities by contract with the railroad companies, have made investments and built up what each may call "a valuable business." They, too, offer transportation between points accessible only over two or more railroads under a single contract, and upon responsible assurance. They, too, offer "increased speed and safety." Except that express companies carry faster (and this, too, may be changed), there is no difference between them, and if express companies are entitled to the rights upon defendant's cars, which they claim, so, too, are all other transportation companies.

So, too, under the principles asserted by the express companies, the "Sleeping Car Companies," as well as the "Fast Freight Companies," can fasten themselves upon the railway companies, and devour their substance.

III.

Common Law Rights and Duties of Railway Companies.

If under the provisions of the statute law, as we insist, no discrimination can be made between transportation companies and individuals, either as to abatements, drawbacks or otherwise, what rights at common law have express companies that give them any advatages over individual shippers?

This opens up the entire question whether at common law transportation companies can have any exclusive rights that do not eqally belong to individual shippers.

Whether these companies can claim exclusively a car or a portion of car for their freight; whether they can demand that their own messenger shall receive, handle and distribute their freight; whether they are permitted solely to increase their revenues and to diminish those of the railway, to pack parcels and conceal their nature and value from the railroad; or whether, as individual shippers do, they must pay on them as such parcels; whether they can demand exclusive advantages for their agents, wagons and freight in and about the depots and stations of the railroads, and such as are not and cannot be accorded to individual shippers; and whether they can demand that all their freight shall be carried as tonnage freight without reference to size or value of parcels, or without reference to its

classification; and that this freight should be carried upon passenger trains without reference to bulk.

These questions came up directly in the case of Sargent vs. B. & L. R. R., 115 Mass., 416. This case will be found to apply with equal force to another branch of this argument.

The plaintiff, an expressman, sued the railroad for damages for excluding him from a road that he had formerly occupied and operated under a contract which the road had terminated. He sought damages for loss of good-will and the loss of an extensive business. He tendered, as he claimed, a reasonable compensation to the railroad, and being refused, brought this action. The Court, through WELLS, Justice, said:

"This action is founded upon the supposed obligation of defendants as common carriers to provide facilities and accommodations to enable the plaintiff to transact his business as an expressman over and upon the railroads of defendant. For this purpose he requires that his merchandise and parcels shall be transported, not as freight under the general charge and control of the managers and servants of the railroad, but in their passenger trains and under the exclusive control and supervision of the plaintiff and his agents, who also require special accommodations and facilities in the cars and stations of the defendants for the receipt and distribution of their packages. It is not alleged that there is any contract for such service. The contract which once existed and the course of business in previous years are recited for the purpose of showing the manner in which the business of the plaintiff had grown up and the good-will which had been gained, as bearing upon the damages caused by withdrawing from him the means for its further prosecution.

"The complaint is that, under the guise of a proposal to sell or let the privilege which the plaintiff and his associates had before enjoyed, to be used exclusively by the one party who would pay the most for it, the defendants had in fact denied it to all and assumed the

conduct of the business of express carriage and parcel delivery by its own agents and servants. * * *

"We know of no principle or rule of law" says the Court, "which imposes upon a railroad corporation the obligation to perform service in the transportation of freight otherwise than as a carrier of goods for the owners in accordance with their consignment, or which forbids it from establishing uniform regulation, applicable to all persons composing the public, to whom the service is due. * * *

"All the provisions of law for the regulation of railroads contemplate the unlimited exercise by the corporation of the right and duties of general carriers of goods and passengers, and this involves the right to adopt any and all reasonable rules and regulations to direct the mode in which their business shall be transacted. They cannot be required to convert their passenger trains to the purposes of freight at the discretion of parties not responsible for the management of the trains; nor can they be compelled to admit other than their own agents and servants upon their trains, or to their stations, for the custody, care, receipt and delivery of freight or parcels.

"Whether the defendants in establishing and conducting the business of their own parcel department, undertake to collect and distribute goods and parcels in a manner which involves acts *ultra vires*, does not affect the question; nor if they do, does it afford the plaintiff any ground of action? His claim is for their refusal to furnish him certain claims and facilities upon their road. The refusal does not involve any acts or exercise of powers of *ultra vires*; nor does the fact, that for many years the defendants did offer certain facilities to separate and independent carriers as express companies, confer any right upon them or impose any obligations, either of contract or duty, upon the defendant's to continue the same unchanged. * * *

"The report finds, that when the plaintiff demanded to be allowed to carry on his express business over said roads as formerly, there was sufficient accommodation in defendant's baggage car for the plaintiff, as well as other occupants of said cars.

"But there was no refusal to carry the plaintiff and his freight upon the same terms and in the same manner as the defendants performed like services for other persons and companies. It was a refusal only to per-

mit the plaintiff not to occupy portions of space of the cars and stations in the same manner and for the same purposes as defendants themselves used and occupied them, paying therefor and for the required transportation, some special rate which could not be well adjusted otherwise than by special agreement."

This question, in its broadest scope, came up in the case of Cambloss vs. The Penn. & Reading Railroad, 4 Brewster, 563.

In this case the Adams Express Company was seeking certain privileges of car room, etc. The railroad had notified them that they would be treated as any other shipper; that their contract with them heretofore existing would cease at a certain time; and that the road intended carrying its own express. The express company sought an injunction from the United States Circuit Court in Pennsylvania. Judge McKENNAN, the Circuit Judge, held that this was not a case for preliminary injunction:

"That if the railroad has assumed the exercise of any franchise not confirmed by its charter, the express company is not authorized to call it to account. If without right it seeks to appropriate the profits of a business of which the express company had the monoply it does not therefore incur any liability to the express company. It is only for a failure to perform the duties of a carrier to the express company as a shipper, that the latter has a right to complain." *Ib.*, p. 590.

The main opinion in this case (McKENNAN, J., concurring), was pronounced by District Judge CADWALADER. The statement of the case is made in the opinion:

"The complainants demanded, as proportional to the magnitude and expansion of their express business, facilities and accommodations on the scale of those which

they had conventionally received from the defendants until the annulment of the contracts of August, 1866, and May, 1872. The defendants objected that certain of the facilities and accommodations thus demanded would be preferential, and that the allowance of them would, therefore, be improper. The questions under this head, were—

"Whether the complainants could insist on having in a passenger train a car for their exclusive use furnished by themselves or provided by defendants, or on having a sufficient space set apart for such use in a car of the defendants.

"Whether the complainants could rightfully insist upon loading and receiving their express freights upon platforms and landings of the railroad depots or stations at the places where defendants had established offices and warerooms for the reception and delivery of the freight.

"Whether the complainants could insist upon the booking or way-billing, etc., being done by themselves instead of by the defendants.

"Whether the complainant could require the admission of an agent or messenger in charge of their express freight to the car containing such freights and require his freedom from those restraints upon ordinary passengers which might hinder his personal care of such freights during their transit by rail; and whether if such an agent or messenger was admitted only as a passenger, paying the ordinary fare, he should be allowed as baggage, to be carried in the baggage car, a trunk containing express freight of the complainants, without being charged more for its excess, if any, in weight above that allowed for an ordinary passenger's baggage and at the same rate."

After this clear statement of the case Judge CADWALADER says:

"It has already been said that they, the express company, have no conventional rights. It, therefore, might seem unnecessary to inquire whether under former conventional arrangements they had a covert monopoly or any undue facilities or advantages. Indeed, the complainants are not understood as now insisting upon preferential facilities to themselves in

right of past conventional relations. The contention would be palpably absurd. But they do insist upon receiving facilities and accommodations of great expansion, which they certainly endeavor to define by the standard of former practical relation. The most favorable way of stating their pretensions is that they claim facilities and accommodations proportional to the actual and prospective expansion of their own business. If such facilities and accommodations are neither preferential to themselves nor inconvenient to others, the demand may be reasonable. But if they are exclusive and preferential, their allowance would promote if not perpetuate a monopoly. The question heretofore considered has been when they are preferential, not whether the railroad must, but whether it can, allow them. * * * The contention that the company is under a compulsory obligation to allow such a preferable advantage is novel.

"These remarks are applicable to the question whether the complainants can reasonably require to have in a passenger train a car furnished by themselves.

"The question depends upon the relative considerations in which the convenience of others, not less than themselves, must be consulted with a view to the arrangements of the trains and to accommodations in and out of depots and stations.

"The complainants cannot reasonably require any space to be set apart for their exclusive use in a car of the defendants in such a train. If the space be vacant those first bringing goods ought to have it. If it be filled, the goods in it cannot be displaced.

"The requirements as of right for an agent in charge of the complainants' express matter, or of any other accommodations or place in the trains than that of an ordinary passenger, under the control of the company's police of the road, seems to be quite unreasonable.

"More unreasonable is the pretension that he can, as a passenger, carry without other payment than as for baggage, a trunk which contains express matter.

"The argument for complainants, citing 12 Harris, 378, and 57 Maine, 188, admits (though perhaps without intending to concede) that the defendant cannot allow the complainant or to any other express carrier, facilities or accomodations amounting directly or indirectly to a monopoly or a partial monopoly. * * *

"They certainly are themselves endeavoring to encroach on the rights of the public, and any partial success of their present effort might prevent equal competition, or embarrass the defendants in transacting proper business at their depots or stations, or at the approaches or outlets, or at the offices of delivery or reception."

In Jencks vs. Coleman, 2 Sumner, 224, where the plaintiff, a passenger upon defendant's boat, was engaged in soliciting passengers for a line of stages, rival to the business interests of defendants, STORY, J., said:

"The owners of steamboats are not bound to admit passengers on board whose object it is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative ro them. * * * It has also been said that the steamboat proprietors are bound to carry passengers only between Providence and New York, and not to transport them to Boston. Be it so, that they are not absolutely bound; yet they have a right to make a contract for this latter purpose if they choose, and especially if it will facilitate the transportation of passengers and increase the patronage of their steamboats. I do not say that they have a right to act oppressively in such cases. But certainly they may, in good faith, much such contracts to promote their own as well as the public interest."

And, being requested by Mr. WEBSTER, he refused to charge that the jury must be satisfied the contract with the stage company was to the interests of the proprietors of the steamboat company and the public, and said it was sufficient if the proprietors made it, believing it for their own interest and that of the public.

This question was directly presented in the case of the R. D. Martin, 11 Blatchford, 233, and an elaborate opinion given by the late Mr. Justice HUNT. The action was also for ejecting a passenger who was prosecuting a business, which was deemed by the carrier hostile to its interests. The learned Justice says:

"They, the defendants (the Steamboat Co.), were bound also to carry all freight presented to them in a reasonable time before their hours of starting. The capacity of their accommodation was the only limit to their obligation. A public conveyance of this character is not, however, intended as a place for the transaction of the business of the passenger. The suitable carriage of persons and property is the only duty of the common carrier. A steamboat company or a railroad company is not bound to furnish traveling conveniences for those who wish to engage on their vehicles in the business of selling books, papers or articles of food, or in the business of receiving or distributing parcels or baggage, nor to permit the transaction of this business in their vehicles when it interferes with their own interests. If a profit may arise from such business, the benefit of it belongs to the company, and they are entitled to the exclusive use of their vehicles for such purposes. This seems to be clear both upon principle and authority;" quoting Story on Bailments, Sec. 591a; Jenks vs. Coleman, 2 Sumner, 221; Burgess vs. Clements, 4 Maule and Sel., 306; Fell vs. Knight, 8 Mees. and W., 269; Commonwealth vs. Power, 1 Am. Railway Cases, 389.

"These cases show," says the Judge, "that the principle thus laid down is true as a general rule. The case of The N. J. Steam Navigation Co. vs. Merchants' Bank, 6 Howard, 344, shows that it is especially applicable to those seeking to do an express business on such conveyances. It is there held in substance that the carrier is liable to the owner for all the goods shipped on a public conveyance by an express company without regard to any contract to the contrary between the carrier and the express company; although the carrier may have no custody or control of the goods, he is liable to the owner in case of loss if he allows them to be brought on board. It is the simplest justice that he

should be permitted to protect himself by preventing their being brought on board by those having charge of them. This rule would not exclude the transmission as freight of any goods, or property which the owners or agents should choose to place under the care and control of the carrier.

"A carrier, like all others, may be so favored when he chooses. Rights, not favors, are the subject of demand by all parties indiscriminately. The incidental benefit arising from the transaction of such business as may be done on board of a boat or on a car belongs to the carrier, and he can allow the privilege to one and exclude it from another at his pleasure.

"A steamboat company or a railroad company may well allow an individual to open a restaurant or a bar on their conveyance, or to do the business of boot blacking or of peddling of books and papers. This individual is under their control, subject to their regulation, and the business interferes in no respect with the orderly management of the vehicle. But if everyone that sees fit can enter upon the performance of these duties, the control of the vehicle and its good management would soon be at an end. The cars or the boats are those of the common carrier, and, I think, exclusively his, for this purpose. The sale or leasing of these rights to individuals and the exclusion of others, therefore, come under the head of reasonable regulations which the Courts are bound to enforce. The right of transportation which belongs to all who desire it does not carry with it a right of traffic or of business."

There is no adjudged case in which the rights of the parties are more clearly stated.

This rule is applicable as well to railroads as steamboats, else the railroad traffic would be at the mercy of transportation companies and individuals.

In the case of Barney vs. Oyster Bay Company, 68 N. Y., 302, the plaintiff, an expressman, sought passage

upon defendant's boat for the purpose of taking, while on board, orders from passengers for the delivery of their baggage. Plaintiff, after being ordered to desist, was ejected. The Court held that it was the general duty of common carriers to carry all persons who presented themselves as passengers, provided there is room in the conveyance and the usual fare is paid.

The Court says:

"The carrier, however, may make reasonable rules and regulations for the conduct of his business, and when they are made known passengers are bound to observe them. He may carry on in connection with his business of carrier any other business, and may use his property in any way he may choose to promote his interests not inconsistent with the duties he owes to passengers. The vessel or vehicle which he uses is his own, and, except as to the extent to which he has devoted it to the public use by the business in which he is engaged, he may manage and control for his own profit and advantage, to the exclusion of all other persons.

"For instance, the sale of books, papers or refreshments are common incidents to the business of a common carrier by certain modes of conveyance, and the carrier may avail himself of the opportunity which his business gives him to supply the special wants of travelers in these and other respects, and appropriate to himself the profits of the business, and exclude third persons from entering the car or vessel to carry on the same business in opposition to him. He may grant or refuse the privilege at his option. * * *

"So also a carrier may establish for the convenience of passengers and for his own profit, on his car or vessel, an agency for the delivery of baggage of passengers, and exclude all other persons from entering to solicit or receive orders from passengers in competition with the agency established by him.

"This is no sense a monoply. It is simply saving to the carrier a legitimate advantage which his position and business give him."

In the case of Fitchburg Railroad Co. vs. Gage et al., 12 Gray, 393, the principle underlying railway freight classifications and tariffs, and the powers of the company in this respect, as we have above stated them, are recognized and enforced.

The defendant contended that while the plaintiff in error (the Railroad Co.) were transporting their ice, it was at the same time hauling over the same portion of their road various quantities of brick for other parties; that ice and brick were of the same class of freight, and that ice was as low a class of freight as bricks in regard to risk and hazard of transportation; and that while the road charged the defendant fifty cents per ton for transportation of ice, it charged other parties only twenty cents per ton for a like service in reference to bricks.

The Court held upon general principles that common carriers were not bound and required to transport every species of freight of the same class for any and all persons at the same rate of transportation.

The Court says with reference to the uniformity of charges, "that the recent English cases cited by counsel for the defendants, are chiefly commentaries upon the special legislation of Parliament regulating the transportation of freight on railroads constructed under the authority of the government there, and consequently throw very little light upon the question concerning the general rights and duties of common carriers, and for that reason not to be regarded as authoritative expressions of the common law upon those subjects. The principle derived from that source is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge in each particular case of service a reasonable compensation and no more. If the carrier confines himself to this no wrong can be done, and

no cause afforded for complaint. If for special reasons in isolated cases the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time or in certain quantities for less compensation than what is the usual, necessary and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief. It could, of course, make no difference whether such a concession was in relation to articles of the same kind or belonging to the same general class as to risk and cost of transportation.

"The defendants do not deny that the charge made on them for the transportation of their ice was according to the rates established by the directors of the company, or assert that the company's claim is in any way excessive or unreasonable. Certainly, then, the charges of the complainant should be considered legal as well as just. Nor can the defendant have any legal or equitable right to insist upon any abatement or deduction, because for special reasons which are not known and cannot therefore be appreciated, allowances may have been conceded in particular instances or in reference to a particular series of services to other parties."

In Regina vs. London & S. W. R. R. Co., 1 Q. B. (1 Ad. & E.), 579, Lord DENMAN said:

"The supposition again of free competition of carriers on the same railway is, practically, little less than absurd; if all difficulties were removed as to the stations, warehouses, landing places and approaches, and all these were supposed as much laid open to the public as the railway itself, the very nature of the mode of conveyance forbids a free competition of a rival carrier."

It will be seen from the foregoing decisions what is the common law rule as understood in this country, and how it is applied to common carriers, including express companies; and it will be further seen upon a careful analysis of the English cases that the rule of the

common law is not different from what has been held in these cases, and that the English cases upon which complainant relies, were decided under particular statutes and do not rest upon the common law rule applicable to common carriers.

In the case of the Great Western Railway Company vs. Sutton, 4 House, L. Cases, L. R., 1869, p. 237, the Court states the common law rule upon this subject through Mr. Justice BLACKBURN, as follows:

"At common law a person holding himself out as a common carrier of goods was under no obligation to treat all persons alike. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession, on being paid a reasonable sum for so doing. And if the carrier refused to accept such goods an action lay against him for so doing. * * * But the fact that the carrier charged others less, though it was evidence to show the charge unreasonable, was no more than evidence tending that way." And it was held that the carrier may stipulate for a less price to some than others, provided none are unreasonable. The Court, after citing the previous cases and fully stating what the common law rule is, gives a history of changes made in it by acts of parliament.

"At first the Legislature in each special act incorporating railroads in England, inserted particular clauses changing the common law as to what constitutes reasonable charges, and making equality in charges an evidence of reasonable rates. Very soon these came to be the usual clauses which the chairman of the committee of the House of Lords used to require to be inserted in all railway bills with more or less modification. These clauses were known by the chairman's name as 'Lord Shaftsbury Clauses'. Finally in 1845, the Legislature embodied in a general act (8 and 9 Victoria, Ch. 20) those clauses which it was thought expedient should be generally inserted in railway acts.

"In this way the common law rule was changed, and the rule was applied by the Courts to the railroads requiring them to make no discrimination as to shippers; not allowing the roads to charge one shipper

more than another, no matter whether the highest rates to any of the shippers may have been reasonable or not."

Every case decided in the English courts upon the question of equality to the shippers, comes either under a special Act of Parliament or under the General Act of 1845, or as that Act has been subsequently amended.

The Court says, p. 238, in the case last above cited:

"It follows from this that if the defendants do charge more to one person than they, during the same season, charge to others, the charge is by virtue of the *statute* extortionate. And I think the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies, acting as carriers on their lines, must be precisely the same as those of a person made to a charge beyond the limit imposed by the common law on ordinary carriers as being more than reasonable.

"The mode of establishing that the demand is extortionate differs in the two cases. When it is sought to prove that the charge is unreasonable, and therefore extortionate, the fact that another was charged less, is only material as evidence for the jury tending to prove that the reasonable charge was the smaller one. When it is sought to show that the charge is extortionate, as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other persons or class of persons at a lower charge during the period throughout which the party complaining was charged more under like circumstances. One single act of charging a person less on one particular day, would not, I think, make the higher charge to all others extortionate during all that day, or week, or month, or whatever the period might be. * * * * * It would be the very essence of the case to prove that the goods were of the like description and carried under like circumstances. But I think that this applies to the de-

scription of the goods and the circumstances of the carriage, and not to the trade of the consignee or consignor. The consignor in the present case was what has been called an intercepting carrier, competing with the defendants in one of the most lucrative branches of their tariff. They would have an intelligble motive for wishing to clog his trade; and I do not see that there would be anything immoral or improper in their doing so by any legal means. But I think that the preamble to the 90th section of the railway clauses, consolidation act 1845, shows that the Legislature thought it inexpedient that railway companies should use their power for such a purpose, and that the intention in passing the equality proviso, was to prevent their treating such persons worse than others."

The cases clearly draw the distinction between the common law rule and the rule under the statute.

The learned Judge then reviews all the English cases that had been decided up to that date upon this question.

The first case was that of Parker vs. The Great Western Railway Co., 7 M. and G., 253. This case was based on Lord SHAFTSBURY'S equality clauses.

The next cases, Parker vs. The Great Western Railway Company, 11 C. B., 545, and Edwards (assignee of Parker), vs. The Great Western Railway Company, 11 C. B., 585. These cases were decided upon the equality clauses.

The next case, Crouch vs. the Great Western Railway Company, 9 Ex., 556, and the second action between the same parties, 11 Ex.. 742, were decided under the equality clause in the Victoria act. And in the latter case the question was raised as to packed parcels, and decided under the same equality clauses.

Up to this time the opinion of the judges had been uniform under the equality clauses.

In the case of Gaston vs. the Bristol & Exeter Railway Company, 5 C. B. (N. S.), 111, the Court decided that an action would not lay to recover back the unequal charge, unless it was also unreasonable.

In Branly vs. Southeastern Railway Co., 14 C. B. (N. S.), 1, the first difference of opinion arose. The claim then was to recover back the excess charges made in France to London. The whole Court of Common Pleas held that statutable obligation as to equality, was confined to the railways in England, and that the common law obligation on the carrier did not require him to charge equally if he charges reasonably. In that case EARLE, C. J., speaking for himself, questioned all the former decisions upon the equality clauses, holding that the construction placed by the Judges upon the Victoria Statute was wrong, and that the common law rule was right, and that the carrier was not confined to the equality clauses, but to the question as to whether the charges were reasonable.

In Baxendale vs. The Great Western Railway Co., 14 C. B. (N. S.), 23, Chief Justice EARLE, gave a very elaborate opinion hereafter quoted in this brief, in favor of defendants on every point. The majority of the Court still adhered to former decisions, placing their judgment upon the equality clauses as heretofore stated.

The latest cases decided are the cases of Palmer, vs. London, Brighton & South Coast Railway Co., L, R., 6 C. P., 194, and the case of Parkenson vs. The Great Western Railway Co., L. R., 6, C. P., 554.

These cases decide that under the Statute the railroads can give themselves no pecular or exclusive privileges, nor one customer any advantage or privilege

over another in the way of freight rates, and that the question is controlled by the statute of 17 and 18 Victoria, Ch. 31, Sec. 2.

THE ENGLISH STATUTE (17 and 18 Vic., C. 31, Sec. 2). provides as follows:

"Every railway company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways belonging to or worked by such companies respectively; and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company; nor shall any such company subject any particular person or company to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

In Marriott vs. London & Southwestern Railway Co., 1 C. B. (N. S.), p. 498, it was held a discrimination under the statute, to allow A the exclusive privilege of driving his omnibus into the station-yard for the purpose of taking up and setting down passengers in the door of the booking office, and refusing the like facilities to others—in the absence of special circumstances, showing it to be reasonable.

"I can well understand, however," says COCKBURN, C. J., "that a case might arise where, by reason of the limited extent of their premises, a railway company might be justified in making arrangements for the admission of a certain number only of public vehicles."

This is but carrying out the equality clauses heretofore referred to, and as we have seen, take these cases under these statutes out of the common law rule.

A thorough analysis of the English cases will show that the ordinary freight rates and the packed parcel rates are controlled, exclusively by the English statutes, known as the equality clauses.

In considering the English cases it must be borne in mind that there is an important distinction between the business of the individual carriers, known as the intercepting carriers of that country, and the express companies in the United States. The English intercepting carriers simply collect the goods, attend to their delivery to the railroad company, receive them from the company at the terminus, and deliver them to the consignees. The railroad retains the exclusive possession of the goods while in transit over its road, and exclusive control of such transportation, and does not grant to the forwarder those facilities over and upon its lines, which are claimed by express companies in this litigation. There are no express messengers, and no special car accommodation demanded to be set aside to them as such. These differences it may be well to bear in mind, so as to see the nature of the extraordinary demands now made by the express companies in this country, showing that they are seeking such discrimination as neither the common law nor the statutes will grant them.

IV.

The express companies ask, and the decree establishes a discrimination in their favor to the injury of the railway companies.

Under this head of discrimination as between transportation companies and individuals, properly falls one of the most important questions in this controversy—the packing of separate and distinct parcels of value going to different consignees, so as to bring them under the tonnage rate, with the purpose to reduce as to them the compensation of the railway company.

In every case we have been able to see decided in the Circuit and District Courts upon this controversy between the express companies and the railroads the judges have invariably placed their decisions upon the doctrine of equality and uniformity between transportation companies and individuals, giving to none rights and advantages over others.

We here propose to show what are known as parcels should be charged by the roads as parcels and not as pound or ton freight.

The tariff of charges which are of record and proof in the cause will show that parcel packages are charged at a certain rate to all shippers. The rate is uniform whether charged to individuals or to express companies. And the proof shows (Mr. Morseman's deposition) that the defendant charged other express companies beside the complainant the same rates that were charged individuals and the same rate that was charged the complainant.

The packing of parcels, we are told by witnesses in this case, is done in order to avoid the payment of parcel rates by the express company.

Complainant contends that it may pack any number of parcels although shipped for different persons and addressed to different consignees, in one bundle, trunk or safe, and that it may place this in defendant's car, ad-

dressed to the farthest point to which any such contained parcel is shipped; that it may open the trunk, bundle or safe on the cars, distribute the parcels as addressed; and that it can only be required to pay defendant on the gross weight of the whole. It claims, too, that it can only be required to pay according to defendant's tariff upon common freight of small value, which may be shipped by express by ton per mile, and that neither the size nor value of the parcel enters into the compensation to which the railway company is entitled.

To illustrate how this works: Defendant's tarift on articles of small value, weighing as much as one hundred pounds, is one dollar per hundred; its express rate between Memphis and Little Rock, on an express package weighing a pound or less, is fifteen cents, and complainant's is the same. Complainant then, say, packs in one parcel one hundred packages, each weighing one-half pound, or fifty pounds in all.

For carrying this from Memphis to Little Rock, complainant charges the public and receives fifteen dollars, but insists that defendant shall carry the whole for seventy-five cents.

If the Courts had not compelled defendant to allow complainant to compete with it on its own road, the defendant, for this carriage, would receive the fifteen dollars, and would give the public the same service for the same money. Where the benefit to the "public" is found in complainant pocketing the difference, has not yet been explained.

Complainant claims, also, that it has a right to demand a receipt for these packed parcels without disclosing their values, and that they should not be required to permit defendant to way-bill it.

In the case of Baxendale vs. Great Western Railway Company, 14 C. B., 23, the question came before the English courts upon the parcel system. We shall hereafter show that these cases are distinguishable from the American cases, they being decided under a peculiar English statute. In this case Mr. Chief Justice EARLE takes the view of the American cases, and presents so clearly, in the course of his dissenting opinion, the common law rule that we beg to quote from him:

"I would premise," says the Judge, "that as railway companies, as common carriers, have equal rights against and are under equal duties towards all the Queen's subjects, so all the Queen's subjects have equal rights against and are under equal duties toward the railway companies as common carriers, without distinction of person.

"This I say to exclude the notion of the plaintiff's having any privilege by reason of their using the description of carriers by railway. They are not common carriers by railway, in the meaning of the railway acts, empowering carriers by railway to hire locomotive power. As between them and the defendants they are customers, having the same rights and duties as other customers.

"The real interest at stake here, as in a vast extent of other litigation, is the interest derived from the interception of parcels from the consignees, so that the interception may reduce many to one aggregation * * * *

"I would premise that the equal impartiality, which is required from railway companies and all common carriers, relates to the way in which the lawful terms on which they choose to conduct their business are carried into execution, and has no relation to equality of benefit, to be derived from each customer for those benefits.

"The company and all common carriers may choose their terms within lawful limits, relating to their terms, their prices, their classes of goods, for different prices, and their mode of receiving and delivering.

"If the terms are not unlawful, if all may equally have the accommodation they offer, and all are equally

called to pay the same price for the same accommodation, according to the price for that accommodation as the carriers have chosen to classify it, they have violated no duty. The plaintiff seems to assume that the company is bound to afford the same benefit to each customer, and that each customer may claim to reduce the price if he has not so much benefit from the accommodation as some others have; and as they have not so much benefit from delivery as some other customers have, they may call on the company to assess what would have been the cost of delivery to them and deduct that cost from the charge they make to them. But the law, which requires equal impartiality, makes no reference to the difference in the amount of benefit received from the service according to the circumstances of each customer.

"The price which the carrier can get depends upon the demand. If consignors demand transportation without delay for small parcels, each has to pay for the accommodation that he uses, and thereby the receipts are according to the number of consignors.

"Under the tariff above mentioned each consignor must pay at least 1s. 6d., though his parcel be merely a letter; but if he has paid the 1s. 6d. for the first ounce, he may send in addition fifty-six pounds for an addition of 6d.

"The consignors pay the same sum; whoever may be entitled to keep it, the contest for it is between the company and the interceptor, and unless the company have power to check the process of interception it is probable that the interceptor may by skillful aggregation bring all consignments into tonnage weights, and undersell the company on parcel rates, and keep all the parcel profits, and leave all the outlay labor and risk to the company."

The Judge says, in answer to the argument of counsel for plaintiff, who insisted that because £3 per ton was the maximum for the tonnage rate, therefore £4 per 800 weight of packed parcels must be unreasonable.

"This argument ignores the principle upon which the parcel rate is charged. The tonnage rate and par-

cel rate have no proportionate relation—one is according to weight and the other according to number.

"The price for a ton of weight of one article is no standard for comparison with the price for one hundred in number of another article. A pound of silver weighs as much as a pound of gold, but the weight is no indication of the relative value of the two pieces of metal; neither is the charge for a given weight of tonnage goods any indication of what ought to be charged for a given weight of parcel goods."

The Judge says, page 34:

"In each of the cases heretofore decided (which he reviews) this litigation has been unsuccessful to the companies on the various grounds of fact on which the Court performing the functions of a jury, have given their verdict. But it has been constantly renewed on a principle which probably will prevail, namely, that service must be paid for according to contract. The company profess to carry upon certain terms; among them is the term that parcels shall be paid for at a higher rate than the same weight of tonnage goods. All who employ them are bound to fulfill all the terms upon their part to be fulfilled, and those who prevent the company from receiving the stipulated price of parcels by interception, do not fulfill this term, but the contrary.

"The plaintiff's interest, as intercepting carriers profiting by packed parcels, is to hinder the railroad companies from receiving parcels direct from the customers in order that they may be consigned through themselves. The railroad companies have an interest in obtaining consignments of parcels direct to themselves and to prevent interception. That interest is legitimate, and they have a right to regulate the conduct of their business for the purpose of protecting their interest."

These views of the learned Judge are in accordance with the decisions of the American Courts, as we have shown and will further show.

That so far as the public is concerned, it does not matter whether the charge is made by the express

company as by the railroad, and the whole system of packed parcels is inaugurated for the benefit of the express company and not for the shipper, and to enable the express company to get transportation of these parcels at a lower rate than other shippers so that they may receive the profit from it.

V.

Inadequacy of compensation to the railway companies as established by the decree further shown.

The plaintiff claimed that the railroad is bound to carry according to weight. The decree so adjudges. This excludes the idea of value which had always entered into the question of compensation to be paid to the common carrier, because it increases the liability of the carrier in proportion to the value. Almost all the witnesses who have testified in this case tell us that the parcel freight is the most valuable of all freight and its transportation pays the companies better than any other freight. Indeed it constitutes the most important items in the profit of the company.

All carriers, including plaintff and defendant, the express companies and railroads classify freights, charging greater rates because of value or bulk or liability to breakage and leakage. All carriers including both parties now before the Court, no statute intervening, have the right to contract with the shipper to limit

their common law liability, and both these parties in their ordinary business exercise this right and by contract limit their liability.

See form of contract made by the Express Co., in Appendix.
Iron Mountain Record, pp. 1132, 1133.

And as an evidence of this fact, the plaintiff in their bills of lading have limited the liability as we have heretofore shown. If any such contract is not made all carriers are insurers of all freights carried. The eminent Circuit Justice held:

"That when express matter is so confided to the charge of an agent or messenger, the railroad company is no longer liable to all the obligations of a common carrier, but when loss or injury occurs the liability depends upon the exercise of due care, skill and diligence upon the part of the railway company."
Iron Mountain Record, p. 63.

If this position be correct, the question arises: What is due diligence and ordinary care? According to the law books, it is that care that a prudent man would exercise in his own business affairs. This is the best definition that can be given, and the one ordinarily given. Apply this rule to valuable parcels carried by the railroad for the express companies. Their contents are not known and their value concealed. The railroad is held by this view to ordinary care. Would the Courts exonerate the carrier if he applied the same care and diligence to the carriage of a sack of gold that he applied to a bag of peas? Would not the diligence and care depend in a great measure upon the value of the article? Would prudent men in their own affairs give more care to the gold than to the peas? This rule would be applied by the Courts. This is the

rule of ordinary care—more prudence is required, more skill, more diligence, in the carrying of a valuable article than of an article not so valuable. Ordinary care is therefore fluctuating—necessarily fluctuating, according to the nature and value of the articles to be carried.

With due respect to the eminent Judge who thus held in this case we do not think that the authorities sustain his view.

How shall the railroad be exonerated from liability as a carrier and insurer of the goods? It can only be done by contract, if at all, not by the contract of other parties, but the contract of the carrier itself. A contract between the railroad and the express company will not exonerate the railroad from the shipper, nor will a contract between the shipper and the express company exonerate the railroad.

In the case of New Jersey Steam Navigation Company vs. Merchants' Bank, 6 Howard, 383, this Court says:

"But, admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned, and this is not to be implied or inferred from a general notice to the public limiting of his obligation, which may or may not be assented to. He is bound to receive and carry all goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal; and we agree with the Court in the case of Hollister vs. Nowlan, 19 Wend., 240, that if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier as it is that he assented to their qualification.

"The burden of proof lies on the carrier, and nothing short of an express stipulation, by parol or in writing, should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference founded upon doubtful and conflicting evidence, but should be specific and certain, leaving no room for controversy."

It will be seen from this that each case of exemption from liabilities must stand upon a specific contract with the shipper, and that must be certain, and not left to implication or inference. The special agreement in this case, under which the goods were shipped, provided that they should be conveyed at risk of Harden, expressmen, and that the respondents were not to be accountable to him or his employers in any event for loss or damage. With this agreement the Court held the parties liable for ordinary care and diligence; the Court holding that but for this contract, the carriers would be chargeable as insurers, and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident, or, in other words, act of God or the public enemy.

See also Bank of Kentucky vs. Adams Express Co., 93 U. S., 184.

If the consignor can sue the railroad company for its fault, because of the contract between the express company and the railroad company, it is difficult to see why the railroad company would not be liable, as a common carrier, for any loss not occasioned by the act of God or the public enemy, unless, in the absence of any reservation or exception in the contract between the railroad company and the express com-

pany, the railroad company had been relieved from the ordinary liability of a common carrier.

"Had the packages been delivered to the charge of the railroad company, without any stipulation for exemption from the ordinary liability of carriers, it would have been an insurer both to the express company and to the plaintiffs."

In the case of the Hannibal Road vs. Swift, 12 Wallace, 267, it was held by the Court that although the goods were loaded by the owner in the road's car, and the owner accompanied the goods on the train and kept watch over them, the road was liable as a common carrier. The liability attached by reason of the railroad company taking charge of the car simply for transportation.

The Court says:

"The case of Mallory vs. the Tioga Railroad Company, 39 Barbour, is much stronger than this. There the company only agreed with the plaintiff to furnish the motive power to draw his cars laden with his property, he to load and unload the cars and to furnish brakemen, to be under the control of the conductor of the train, to accompany them. Yet the company was held liable as a common carrier for injuries to the cars and the property of the plaintiff not caused by inevitable accident or the public enemy. The Court did not consider the fact that the property was transported in the cars of plaintiff, and that the cars were loaded and unloaded by him affected in any respect the liability of the company, the entire train in which the cars were moved being whilst on the route under the control and management of its servants and employees."

Doing its ordinary business, a railroad company may and does select its own agents, to whom it is willing to intrust the care of property while in transit; it may and constantly, through its managing officers, does know

what property is in transit and in the custody of such agents. Consequently, in case of accident, it has the knowledge necessary to enable it to take precautions against loss, and to supervise the conduct of the agents immediately in charge of such property. With the selection of the agents of the express company it has nothing to do. It cannot take bonds for the faithful discharge of their duty; it is not allowed to supervise their action; it has no knowledge of what property is in their custody. It is not allowed to have that knowledge or to ask for it.

Now, suppose an accident caused by the negligence of some employee of the railroad company—say the negligent driving of a spike. The agent of the express company has in his possession a package containing twenty thousand dollars in currency, for the carriage of which the express company receives payment from its shipper or consignee, but which it does not and is not required to report to the railroad company. Suppose the agent of the express company abstracts that package, or, say that, because of an injury received, or from carelessness, or fright, he fails to give it proper attention, and that it is stolen by some other person; what chance of escaping liability is left to the railroad company? The express company can prove that the package was on the train, that it was lost, that the accident occurred through negligence. The railroad company can prove nothing. It can say that it did not know the package was on the train, and had no chance to provide for its safety. But that is no excuse. For, if the Court below is right, it had no right to such knowledge. In such and all the like cases which may occur, it is at the mercy of the express company.

Is it just to force upon any one a liability of which he is not informed, for which he receives no consideration, and against which he has no opportunity to protect himself?

VI.

What discriminations are allowable?

Every shipper has a right to demand that his goods shall be carried for a reasonable compensation, but the carrier in the absence of any statutory provisions may make discriminations, provided they are not unreasonable or unjust.

As the Constitution of Missouri has made a distinction between discrimination and *unjust* discrimination, the Legislature cannot destroy the distinction. And the question comes back to us, as to whether the rates made by the railroad as to express companies are unjust, without reference to what is charged others? This is the common law rule, as has heretofore been shown.

The authorities make the distinction properly between discrimination and unjust discrimination. Every discrimination is not necessarily an unjust discrimination. Inequality is not necessarily unjust discrimination.

In the case of the Chicago & Alton R. R. Co. vs. The People, 67 Ill., 11, the Court holds Sec. 15, Art. 11, of the new constitution, which provides that the General

Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in rates of freight on the different roads, etc., is a recognition of the fact that there may be discriminations which are not unjust, and by implication it restrains the power of the Legislature to a prohibition of those which are unjust.

In the case of the Toledo, Wabash & W. R. R. Co. vs. Elliott, 76 Ill., 67, the Court holds that a rebate in the price of transportation to one shipper, is not necessarily an unjust discrimination against other shippers. The Court says :

"The contract is not in violation of the statute to prevent unjust discrimination in charges by railroad companies. The contract was to carry the grain at the customary rates. The rebate in the charges was a matter of private agreement between the carrier and the shipper."

The case of the Eclipse Towboat vs. Pontchartrain R. R. Co., 24 La. (An.) 1, arose upon the following facts: the defendant owning a short railway from New Orleans to Lake Pontchartrain, and one Morgan owning a line of steamers plying from the lake terminus to Mobile, and the plaintiff and other parties owning two steamers in the same trade, an agreement was made by defendants with Morgan, and temporarily with the proprietors of the other steamers respectively, to share *pro rata* the through freight from New Orleans to Mobile. It appeared that this arrangement was unprofitable to the defendants, for the line of steamers by competing and lowering the rates of freight greatly reduced the share coming to the railway. The defendants, therefore, entered into agreement with Morgan by

which the latter loaned them $250,000, and the former agreed to prorate with him the through rates from New Orleans to Mobile, and to charge all other steamers the tariff paid by the public generally. The plaintiffs immediately laid up their steamer and sued for damages on the ground that the prorating with Morgan and refusing to further prorate with plaintiffs, was an illegal combination with Morgan to confer upon him an unlawful monopoly and preference. The Court held that the acts of defendant were not in contravention of any statute of Louisiana, or any principle of law; that they might agree or refuse to prorate through freight with anybody, and the plaintiff could not complain of a refusal to prorate with them, and as common carriers in the absence of statutory prohibition, the acts in the premises were not unlawful.

If, then, there be no statutory rates for express matter, and the rate is left to contract, and in the absence of contract to what shall be reasonable, then what is reasonable is contingent upon many circumstances. The same rules that apply to ordinary freight would not apply to express freight. The freight must be carried upon passenger trains, which are much more expensive than freight trains, and run at much greater speed. These trains must be stopped at every station where express freight is to be delivered, whether required for passengers or not. An express car is to be run whether much or little freight is to be carried; this extra space is always to be kept open. Many other elements which we have heretofore mentioned must of necessity enter into the rate to be fixed.

VII.

The Court of Chancery has no power or jurisdiction to fix and establish rates or determine the compensation to the defendants.

But whilst we admit that a carrier may be required to transport for a reasonable compensation, we deny that a Court of Chancery has a right to fix in advance what is or is not a reasonable compensation. In the absence of any contract for rate of carriage the carrier must judge for himself what is a reasonable and proper rate. If he exceeds that, he would be liable for damages to the shipper, and it was error in the Circuit Court to fix the rate in advance, as has been done by the decree in this case. What is reasonable depends upon the special facilities extended and the value of services rendered. The value is not the same upon any two roads, or upon the same road for any determinate time. A Court can deal with a single case, but it cannot deal with a vast business *en masse*, and *in futuro*, as the decree undertakes to do.

AS TO THE SUBJECT MATTER OF THE BILL: the defendants maintain

THAT IT FALLS UNDER NO RECOGNIZED HEAD OF EQUITY.

The defendants submit, with confidence to the judgment of the Court, these three considerations:

1st. In form the bill is framed to obtain a restraining and also a mandatory injunction to compel a common carrier to perform its common law obligations.

The bills ask in addition that the Court will proceed to settle the amount of reasonable compensation. No case can, we think, be found (where no contract exists, specific performance of which is prayed) in which the performance of the common law duties by bailees of any class has been held to be the subject of equity jurisdiction. All the cases are those in which redress is sought at law, and the constitutional right of trial by jury preserved.

2d. If equity has jurisdiction to restrain common carriers from refusing to perform their common law duties, it is submitted that the doctrine under which, in cases of bills of discovery, the Court once possessed the jurisdiction, will proceed to dispose of the whole cause on its merits, has any application to cases where a perpetual *injunction is the object of the bill*. If this were otherwise then in all cases where an injunction can be allowed a court of equity would draw to its forum the decision of all questions, although there existed a plain and adequate remedy at law for their decision.

3d. If, however, the jurisdiction exists in such case it is impossible to see how a court of equity can fix now and forever what shall be reasonable compensation to a carrier; that compensation must be fluctuating, dependent on the increased or diminished costs of transportation, and if it is to be fixed in reference to the charges of other or competing roads and not upon the cost, operating expenses and a reasonable profit to the road employed, constant and renewed applications to the Court must be the result. In fact, the Court will be constantly employed in determining the effect of altered conditions of fact. Even in cases of specific

performance a court of equity only acts when it can dispose of a matter by an order capable of being enforced at once. It does not decree a party to perform a continuous duty over a number of years, but leaves the opposite party to his remedy at law.

2d. Drury & Warren, 80.
2d. Phil., 60.
Plakett vs. Bates, L. R., 1 Chan. App., p. 117.

The plaintiffs insist that the Court by the power of mandamus or injunction may fix rates and compel the compliance of defendant with those rates. They have cited a number of cases to maintain this position. An analysis of those cases will show: 1st. That the writ was issued to compel compliance with some express legislative requisition. 2d. Where it was intended to prevent an unlawful discrimination, and, 3d. Where it enforced or specifically performed a contract.

1.

Union Pacific R. R. vs. Hall, 1 Otto, 243:

By Act of Congress the railway company was required to operate its whole road as a continuous line. It assumed to treat its bridge over the Missouri River as not a part of its road, operated by a transfer company and charged a separate fare and freight rate. The only question was whether the bridge was part of the road, and it being so found, the writ which enforced compliance with the specific requirements of the act, was held properly issued. The Act of Congress specifically enacted that the duty in question might be

enforced by mandamus in any federal Circuit Court having jurisdiction of the railway company.

State vs. Hartford & New Haven R. R. Co., 29 Conn., 539:

The railway was chartered to build and operate a road from Hartford to the navigable waters of New Haven harbor. It accepted the charter, constructed the road, and for some years ran its passenger trains to the harbor, connecting with steamers to New York City. It ceased running passenger trains to the harbor, though still running freight trains there, and stopped its passenger trains at a point a mile and a half from the harbor. It sought to justify this under a contract it had made with another railway.

The Court held it bound to operate every material part of its road and a mandamus issued.

Rex vs. Severn & Wye R. R. Co., 2 Barn. & Ald., 646:

The railway was chartered to build and operate a road from and to certain places, and among others from a place called Mary's Stock to the summit of Churchway Engine. It constructed the railway and operated it and took tolls on the part named. It afterward tore up the rails upon part of the road between these points. It was stated, and not denied, that this was done to prevent competition of collieries situate on this part of the road with others owned by the leading members of the railway company.

It was conceded that the proper remedy was by indictment.

But the Court held that mandamus was proper, and should issue to compel rebuilding of the destroyed

road. ABBOT, C. J., adding: "The writ should be to reinstate and lay down again, not to maintain the road."

People vs. Rochester and State Line R. Co., 14. Hun, 371:

Held, where a railroad company fails to construct fences and cattle guards, as required by statute, a mandamus will issue compelling it to construct and maintain them.

People vs. Troy & Boston R. Co., 37 How. Pr., 427:

A mandamus issued to compel the building of bridges required by statute.

Great Northern R. R. vs. Clarence R. R., 1 Coll., 507:

The plaintiff company, by act of Parliament, was empowered to build a bridge across the defendant company's tracks. After the place had been selected and approved by a proper officer, the defendant company built a wall in such manner as to prevent plaintiff from building its bridge. It was enjoined from maintaining the wall and from thus obstructing plaintiff in the exercise of its statutory right.

Commonwealth vs. Eastern R. R. Co., 103 Mass., 254.

The charter of the company contained a reservation of power to the Legislature to amend, alter or repeal. The Legislature, by special act, required the company to erect and maintain a station at a particular place. The company refused and contended that the act was unconstitutional.

The Court held the statute well passed, and that it must be obeyed.

Neither injunction nor mandamus was issued. The action was in tort for recovery of a penalty, and judgment went for plaintiff.

2.

Vincent vs. Chicago & Alton R. R. Co., 49 Ill., 37 :

A statute made it unlawful to deliver grain into any other warehouse than that to which it was consigned.

The company had permitted the owner of the warehouse to lay down a side track connecting his warehouse with the road, and had used this track. It afterward refused to deliver grain to his warehouse, while delivering to another no more accessible. It contended that it was not bound to deliver off its own tracks, and that the side-track did not belong to it. The Court held that by its action it had made the side-track part of its road ; that it could not discriminate in this way, and mandamus to prevent such discrimination issued.

Chicago & N. W. R. Co., vs. People, 56 Ill., 365 :

Mandamus to compel the railway to deliver grain to a particular elevator.

It appeared the railway had two divisions, the Galena and Wisconsin ; the grain bronght over the Galena division could only be delivered at plaintiff's elevator at great additional trouble and expense. As to grain over this division, the application was denied in words which which may well be cited for defendants in this case :

"It would be a harsh and unreasonable application of the rule announced in the Vincent Case, and a great extension of the rule beyond anything said in that

case, if we were to hold that these relators could compel the company to deliver at their elevator grain which had been transported over the Galena division merely because the delivery is physically possible, though causing great expense to the company and general derangement of its business." (375).

As to grain over the other division the mandamus was granted, because, as the Court say, that neither by common law or statute, can a carrier say he will deliver to A. and will not to B., the latter offering equal facilities.

Harris vs. Cockermoth R. R. Co.:

The company charge the relators for hauling their coals more than it charged another party. Admitting the discrimination, it set up several reasons, all but one of which, as facts, were found against it. That was, the owner of the land upon which the favored colliery was situate threatened to build a competing road, and the reduced rate was given to prevent this competition.

Held, not sufficient; that the discrimination was unlawful, and in violation of a statute.

Marriot vs. London & S. W. R. R. Co., 1 C. B., 498:

The railway company gave another party the exclusive privilege of driving omnibuses into the station yard, and refused to allow plaintiff to do so.

Held, in the absence of evidence showing such action reasonable, it was a breach of the prohibition against the granting of undue discriminations contained in the 17th and 18th Vict., C. 31, S. 2.

3.

The Earl of Lindsey vs. The G. N. R. Co., 10 Hare,, 643:

The Earl contracted with a railway company, whose project was pending before Parliament, that they should take his land, and that the company should make and maintain a first-class station at a particular place. By authority the company amalgamated with another and the amalgamated company took the land.

Held, it was bound by the contract, and that it must be specifically performed.

Storer vs. Great Western R. Co., 2 Y. & Coll., 48:

The company being authorized to build a certain road, applied to Parliament for authority to make a deviation. Storer opposed it, but withdrew his opposition upon the company agreeing to buy such part as it needed of his land, and to make and maintain a neat archway, etc.

The company took the land.

Held, equity had jurisdiction to compel specific performance of the contract as to the archway.

Wilson vs. Furness Railway Co., L. R., 9, Eq., 28:

For consideration received the railway company agreed to make a carriage road between certain points and to build and maintain a wharf.

Held, having received the benefit the company cannot evade the agreement. "The contract must be performed."

Sanderson vs. Cockermouth Railway, 11 Beav., 497 :

A railway company about to sever plaintiff's land agreed to purchase the part it wanted and to make such roads, ways and slips for cattle as may be necessary.

Held, the plaintiff was entitled to specific performance.

Hood vs. The Northeastern R. W. Co., L. R., 8 Eq., 661 :

On a purchase of land the company made a contract with the vendor that a particular portion should always be used as a first-class station.

Held, the vendor was entitled to specific performance.

Green vs. West Cheshire R. R. Co., L. R., 13. Eq., 44 :

In consideration of the withdrawal of a landowner's opposition to its bill in Parliament, the company agreed to make and forever maintain a siding at a specified place.

Held, the agreement should be specifically performed.

Great Northern Railway vs. Manchester Railway, 5 De G. & S., 138 :

Defendant by a contract, containing many particulars, granted to the East Lincolnshire Railway the right to run engines, etc., between Great Grimsby and New Holland. The rights of the East Lincolnshire Railway vested in the plaintiiff. Disputes arose and defendant prevented the plaintiff from running its engines and trains between those points.

Held, the agreement was permanent, and not a mere license revocable by either, and an injunction issued restraining defendant from preventing plaintiff from running its trains as agreed.

I. & C. R. R. vs. the State *ex rel.* City of Lawrence, 37 Ind., 489:

The railway company had acquired the right of way through the city by an ordinance which required it to make and keep up crossing places, etc. This duty being neglected, held it should be enforced by mandamus.

Mobile & Ohio R. R. Co. vs. Wisdom, 5 Heiskell, 125, 155.

Madison County had subscribed to the construction of the road. The act under which the subscription was made provided that the collector should give taxpayers certificates of the amounts paid, "which should be received by the railway in payment of freight or passage."

The Court held that, by accepting the subscription, the company accepted the condition; that it was a contract, and that compliance must be enforced by mandamus.

The Court said:

"In the case before us the legal right is clear, the obligation created by the general statute and the acceptance of its provisions and benefits by the company is obvious, and the withholding of the right is illegal and unjust."

The defendant insists that the case at bar falls under neither of these heads. These cases go to show that

courts of equity have not undertaken to override the law, but to follow it.

VIII.

Claims of the express companies based on expired contracts and usage thereunder.

The claims of the express companies in this case arise out of what they assert to be a usage that has grown up with the consent of the railroad companies, so that the express business has become a commercial necessity which cannot now be dispensed with; and they further insist that they have acquired rights in consequence of the establishment of that usage which cannot now be resisted by the railroads and disregarded by the courts, even if the railroad companies are capable of performing the same service.

The facts in this case show that the privileges claimed by the complainant were accorded under the terms of special written contracts, which have been terminated under the provisions of the contracts themselves; and it is claimed that the courts may supplement and modify these contracts by extending their provisions indefinitely; and the testimony further shows that the express business all over the country has been carried on for the last forty years, or more, under special verbal or written contracts.

But these contracts (says Judge BAXTER), in his opinion relied upon by the plaintiff, "were in affirmance of the pre-existing legal rights of the complainant, and an admission by the defendant that the business proposed was within the scope of its duties, and reasonably remunerative." What pre-existing legal rights? Is it the right, in common with every shipper, to have his freight transported by the railroad for a reasonable compensation? If so, that is not denied, but this is not sufficient to satisfy the claim of the express companies. Is it the right to have his express freight transported in a special car, under the charge of a special messenger, and for a fixed compensation? If so, it belonged to the first expressman who ever engaged in the business, and before it was ascertained or could be ascertained, that it was a public necessity or a public convenience and before, in the language of the learned Judge, "the express business had so interwoven itself into the present methods that it cannot be dispensed with," and before, in the language of the same Judge, "it had attained its present enlarged usefulness under the fostering care of the railroads."

These pre-existing legal rights of the complainant did not exist in England, where the mode of transportation by railroad commenced about the same time that it did in this country, and does not exist to this day, so far as we are informed. There the railroads have no interlopers, no agencies above their control, with the power to receive and deliver at their own stations and to superintend in transit the freight which is to be carried over their roads.

It is a novel proposition, that because public convenience, or even public necessity, demand that bus-

iness shall be carried on between two individuals, or two corporations, in a particular mode, in the absence of any legislation on the subject, therefore, the courts have the right to determine that it shall be done in that way, and no other.

The courts, no doubt, have the right to decide that a contract already made is illegal, or in restraint of trade, or against public policy. But to determine in advance what contracts shall or shall not be made, or that business shall be done in a particular way, because, in its opinion, public policy requires it, is a startling proposition. The difference is between breaking a contract and making a contract, between declaring what the law is and what it ought to be and shall be, between the exercise of a judicial and a legislative power.

Upon what principle is the doctrine founded? Is it because the State has the power to establish police regulations? But the Court is not the State—it is the province of the legislative department of the Government to establish police regulations. Is it because a custom has been established to do business in a particular way? It could hardly be claimed that a custom could be established by a special contract; if so, any contract, although limited in duration by its terms—if it continues for so long a time as to be profitable to the parties and convenient to the public—may be continued in force indefinitely, at the wish of either of the parties, although against the protest of the other, after it is at an end by the terms of the contract itself.

The foundation of the power on the part of the State to fix compensation and to regulate rates is that it is a

police power, and therefore the State has the power to establish police rules and regulations. The Legislature may lay down a rule and call it reasonable; it may not be so in the opinion of the Courts, but it is the law, nevertheless; and to say that the State through its legislative department may not determine what is reasonable and what is unreasonable, is to say that there is no discretion on the part of the State in determining what is a proper police question.

Pierce on Railroads, p. 466.
Munn vs. Illinois, 94 U. S., 113.
Union Pacific Railroad vs. the United States, 99 U. S., 700.

In the Sinking Fund cases just referred to the Supreme Court of the United States, 99 U. S., p. 761, says:

"The distinction between a judicial and a legislative act is well defined. The one determines what the law is and what the rights of parties are with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it."

IX.

Claims of the Express Companies based upon what they style Accessorial Service.

In pleading and testimony plaintiff bases much of its claim upon the assumed fact that it performed services which it classes as accessorial to the transportation of its freight upon railroads This claim, as a destructive

claim, has been entirely ignored by the Circuit Justice in his opinion, and in the decree based upon that opinion. Still we think it best in this brief to take some notice of the claim as presented by plaintiff.

The words "accessorial services" and the notion it expresses are entirely new, even to expressmen.

Mr. H. Julier, Assistant General Superintendent of the American Express Company, in his twenty years' experience as an expressman, had never heard either the word or the notion until about six months before he testified (Iron Mountain Record, page 563, x-Q. 22).

This division of the express business grew out of the necessity imposed upon the express companies to devise something which would justify their demand that the Courts interfere in their favor, assist them in violating their contracts and condemn the property of the railway companies to their use.

In the short time mentioned, six months, this notion had so grown that "accessorial services" included every expense of the express business except such compensation as they were willing to allow to the railways.

It included not only the wagon service, for which there might be some show of plausibility, and which will shortly be noticed, but also the cost or rent of offices, the expense of fitting, heating and lighting them, the cost of books and way-bills and other stationery used in the offices and at other places in its business; the salaries of officers, including superintendents and assistant and division superintendents; the wages of clerks in the offices, of messengers, route and station agents and laborers; the value of the trunks, boxes bags and safes used for packing freights for transpor-

tation, attorney's fees and Court costs, insurance on property in the offices of the company, and upon goods in transit, and, in short, as stated by this witness :

" All the outlays, expenses and services of whatsoever nature, opposite to those performed by the railroad companies in the express business " (x-Q. 30).
" Every conceivable item, except simply that of railroad transportation " (x-Q. 37).

It is evident, if the claim to have all its expenses paid, directly or indirectly by defendant, can be sustained, that complainant's business has in it no element of risk—that it is all profit ; and it seems just as evident that the part of the business assigned to the defendant is the loss.

The same witness (page 540) undertakes to state what is a " reasonable and proper compensation " to the express companies for accessorial services," and to railroads for transportation. This he distributes : Fifty per cent. as compensation to the express company for accessorial services ; not exceeding forty to the railroad for transportation ; and the remaining ten per cent. " would be for loss and damage and profit." This " profit " is, of course, to the express companies.

It must be remembered that this division of the receipts of the express company, and all information as to its expenses, rest entirely upon general statements of witnesses, in which the actual cost of no one single item has been given. The complainant could have made exact proof if it would, but, for some reason, it preferred to rest upon general statements made by witnesses, none of whom claim to have made the in-

quiries or the computations necessary for exact statement.

With us, however, the question is not what are complainant's expenses, but why should defendant be required to pay any part of them?

It has not been shown that defendant is benefited by complainant's continuing business over its line. This is not even alleged. The contrary is proved.

Iron Mountain Record, pp. 889, 890.

The only allegation is that it is necessary for the benefit of the public. In what way or how the public is benefited is not shown. It is in proof that when defendant began this business it at once offered to do it for the public at thirty-three per cent. less than complainant had charged for like services before. And that complainant at once reduced its charges and began this expensive lawsuit to hold part of the business at these reduced prices. It would seem that defendant had been the friend of the public; that complainant, while it had opportunity, was an extortioner, and that complainant's love for the public only developed when it found that through defendant's competition and reduced rates it was in danger of losing its business.

Again, how can the public be benefited by defendant being required to make this abatement to complainant? If defendant will carry for A a specific article from Memphis to Little Rock for one dollar, and complainant, as it avowedly does, charges A the same price for procuring the same carriage, how is A benefited by the fact that complainant retains fifty cents of this dollar? Plaintiff avowedly charges ship-

pers the same rates for the same carriage which are charged by defendant, and the idea that the shipper is benefited by its retaining part of the compensation is absurd.

It is doubtless true that the shipping public is benefited by competition. That has been proven in this case for competition by defendant has compelled complainant to reduce its charges. But this competition has not resulted in complainant reducing its charges below the reduction made by defendant. It did no more, and offers to do no more than to carry at the same rate. If it can make defendant pay all its expenses, either directly or in the form of an abatement, this it can well afford to do.

But although the plaintiff has, so far, through the action of the Courts, compelled defendant to repay all its outlays for expenses of its business it has carefully abstained from giving the public any part of the benefit. It still charges the same rates charged by defenddant.

Competition can only benefit the shipping public by reduction of rates, and this plaintiff's competition does not effect.

It seems hardly necessary to say that if any material part of the claims of the express companies are found in their favor that the railway companies must abandon the field.

For having its own expenses to pay no railway can compete with a rival, who, in its own cars, and by the use of its property, does business without expense.

Success of the express companies, then, means that competition with them must cease. No one need ask what will then happen to the public.

There is one part of this "accessorial" service as to which, at first blush, the claim of complainant appears reasonable. This is the wagon service—that part performed by wagons in cities in gathering up and delivering freights. But, upon thought, it is apparent that this can only benefit defendant by increasing the total amount of its business, or by bringing to it business which it would not otherwise receive. It is not shown that defendant is thus benefited by complainant. On the contrary, for the concession that the whole volume of business is not more than one messenger can handle, it may well be inferred: 1. That defendant, which must keep its own office and wagons in each of the cities in which this service is done, can, without additional expense, do the whole business itself; and, 2, That instead of being benefited, defendant is actually injured by complainant's interference.

The fact is, in cities of any size, the wagon service is, in the language of Mr. Agee, witness for complainant, a "necessary adjunct to the business," "absolutely necessary to the conduct of the business." This statement gives the key to the matter. Express companies establish this service as a means of securing business. None of them make any separate charge for it. They set up and keep their wagon just as a merchant in a city sets up and keeps his delivery wagon, and for the same purpose. He makes no additional charge for delivering goods purchased, but relies upon increased sales and consequent increased aggregate profits for his compensation. In the express business the same thing is done, for the same purpose, and with the same reliance.

That this is true is proven by the fact that wagons

are only used in the larger towns and cities. Thus Mr. Agee (the route agent of the plaintiff) says that upon the whole line of the Iron Mountain Road as it then existed—645 miles in length, and having over one hundred stations for the reception and delivery of freights—wagons were used by plaintiff at but seven places. And that upon the Memphis & Little Rock Road—135 miles in length, and having over twenty stations—wagons were only used in Memphis and Little Rock. At all smaller stations the public is left to do its own accessorial service.

The principal reason, however, why this rebate for wagon service should not be compelled is that neither complainant nor defendant make any charge for it. No deduction is made by complainant from its charges to its customers, when this service is not rendered.

If a shipper brings his package to the office or depot, and the consignee calls for and receives it there, no accessorial service being performed, no deduction is made by complainant from its regular charges.

See Testimony Albright, Complainant's Testimony, Iron Mountain Case, Cr.-Q. 203, 208.

The shipper—the public—although it may do its own "accessorial service" receives no deduction, rebate, or whatever it may be called, from the express companies. He is clearly not benefited by any rebate which may be made or compelled by the railroad companies to the express companies on account of this service. The only benefit is to the express company, and to that alone. The public is as well served by the railroad company as by the express company, and at the same

price. What public interest, therefore, is advanced by the interference of the Courts.

X.

There is no certain line of demarkation between express matter and ordinary freights, and the decree fixes none, and yet compels the railway companies to permit the plaintiff to carry on their roads all express matter.

There is another difficulty to be met with in determining the rights of express companies, and their claims to exact from the railroad companies a compliance with the demands to have shipments made to suit them, and that is as to what comes within the terms, express freight, or matter.

To say it embraces all matter which may be shipped in express cars or passenger trains, is to say that the express company shall have the right to demand the shipment of anything they choose to call express freight. Lumber, furniture, iron rails, lead, lime, cement, almost anything, indeed, that can be carried on a freight car, can be carried on an express car; and if there are any articles that cannot be so carried on an ordinary express car, a logical deduction from the doctrine assumed by complainant would enable an expressman to demand that a car should be made to suit him. As a matter of fact, as appears by the testimony

in this case, the express companies do ship, by railroad on express cars, many articles which come under the usual designation of ordinary freight. How far may the express companies require this thing to be done? If speedy transportation is the only element that is to control, then, the expressman may encumber passenger trains with such heavy freights as to materially hinder the running of passenger trains, and deprive the railroad company of earnings for the transportation of freight which properly belongs to it. Indeed, if, in the opinion of the Courts, the public can be better accommodated by turning the railroad trains over to the expressmen, or such of them as will best accommodate the express companies, why should it not be done?

Neither the testimony of the witnesess produced on the part of the complainant in this case, nor the decree of the Court, will enable us to determine the exact nature of what is called the express business. The Court, in its decree, says as follows: "That the express business, as fully described and shown in the record, is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized so as to require the Courts to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads." But this leaves us as much in the dark as ever, for the Court as well as the Decree, fails to describe the nature or character of the large mass of freight usually carried on steamboats and railroads, as distinguished from what is claimed to be express freight. Any decree restraining the railway companies

precluding the express companies from the transportation of express matter, must define with precision what constitutes express matter. This has not been done, and the line of demarkation between that and ordinary freight is uncertain and obviously disputable.

When these corporations are permitted, by the sanction of judicial authority, to dictate to the railroads what shall be claimed as express freight; when they shall demand of railroads that they shall attach to their passenger trains cars for the transportation of the heaviest freight and demand their transportation as express matter—the tendency is that way—and neither the refusal of the railroads nor the protest of the public can stand against these pre-existing legal rights so claimed. When that is done, as it may be, then indeed the railroads as well as the public will be at the mercy of these transportation companies.

FINAL POINT.

Another and conclusive reason why the bills should have been dismissed is, that the relief asked is not with respect to the past but the future, not for a specific time resting on contract, but at the option of the Express Company for an indefinite period. And such relief is asked not with reference to single or specific acts, but with reference to a *continuing and complicated business arrangement*, necessarily subject from day to day to changes and modifications. Such an arrangement it is not competent judicially to create and regulate. Where it rests on contract it can be protected

and enforced. So if there were a valid statute requiring the railway companies to extend the requisite facilities to the express companies for doing their business upon the railway companies' roads, such right could be enforced in an appropriate manner in the Courts. That the Courts can not grant relief such as is here asked has been decided by this tribunal, in the case of the Atchison, Topeka & Santa Fé Railroad Co. vs. The Denver & New Orleans Railroad Co., 110 U. S., 675.

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APPENDIX.

Opinion of Mr. Justice Miller.

MILLER, Circuit Justice:

In these cases, argued before me at St. Louis, with Judges MCCRARY and TREAT, I can do no more than present certain general conclusions at which my mind has arrived in regard to the propositions argued by counsel:

1. I am of the opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.

That while it is not possible to give a definition in terms which will embrace all the classes of articles so usually carried, and to define it with a precision of words of exclusion, the general character of the business is sufficiently known and recognized as to require the Court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads.

That the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage, which, to a greater or less degree, attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandize and the like.

2. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it, and to refuse permission to this agent to accompany these packages on steamboats or railroads on which they are carried,

and to deny them the right to the control of them while so carried, is destructive of the business and of the rights which the public have to the use of the railroads in this class of transportation.

3. I am of the opinion that when express matter is so confided to the charge of an agent or messenger, the railroad company is no longer liable to all the obligations of a common carrier, but that when loss or injury occurs, the liability depends upon the exercise of due care, skill and diligence on the part of the railroad company.

4. That, under these circumstances, there does not exist on the part of the railroad company the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners or by the express carrier.

5. I am of the opinion that it is the duty of every railroad company to provide such conveyance by special cars, or otherwise, attached to their freight and passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business.

If the number of persons claiming the right to engage in this business at the same time, on the same road, should become oppressive, other considerations might prevail; but until such a state of affairs is shown to be actually in existence in good faith, it is unnecessary to consider it.

6. This express matter and the person in charge of it should be carried by the railroad company at fair and reasonable rates of compensation; and where the parties concerned cannot agree upon what that is, it is a question for the Courts to decide.

7. I am of the opinion that a court of equity, in a case properly made out, has the authority to compel the railroad companies to carry this express matter, and to perform the duties in that respect which I have already indicated, and to make such orders and decrees, and to enforce them by the ordinary methods in use necessary to that end.

8. While I doubt the right of the Court to fix in advance the precise rates which the express companies shall pay and the railroad company shall accept, I have no doubt of its right to compel the performance of the

service by the railroad company, and after it is rendered, to ascertain the reasonable compensation and compel its payment.

9. To permit the railway company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance or at the end of every train, would be to enable them to defeat the just rights of the express companies, to destroy their business, and would be a practical denial of justice.

10. To avoid this difficulty, I think that the Court can assume that the rates, or other mode of compensation heretofore existing between any such companies, are *prima facie*, reasonable and just, and can require the parties to conform to it as the business progresses, with the right to either party to keep and present an account of the business to the Court at stated intervals, and claim an addition to, or rebate from the amount paid

And to secure the railroad companies in any sum which may be thus found due them, a bond from the express company may be required in advance.

11. When no such arrangement has heretofore been in existence it is competent for the Court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to Master, &c.

12. I am of opinion that neither the statutes nor constitutions of Arkansas or Missouri were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the right of the express companies.

Decree.

It is by the Court ordered, adjudged and decreed, as follows:

1. That the express business, as fully described and shown in the record, is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized so as to require the Court to take notice of the same as distinct from the ordinary

transportation of the large mass of freight usually carried on steamboats and railroads.

II. That it has become the law and usage, and is one of the necessities of the express business, that the property confided to an express company for transportation should be kept while in transit in the immediate charge of the messenger or agent of such express company.

III. That to refuse permission to such messengers or agents to accompany such property on the steamboats or railroads on which it has to be carried, and to deny them the right to custody of the property while so carried, would be destructive of the express business and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents.

IV. That the defendant, its officers, agents and servants have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's company, or to demand a knowledge of the contents thereof, nor to refuse transportation thereof unless such inspection be granted or such knowledge be afforded.

V. That it is the duty of the defendant to carry the express matter of the plaintiff's company, and the messengers or agents in charge thereof, at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit, and is to include as well the transportation of such messengers or agents as of the express matter in their custody and under their control.

VI. That on and subsequent to the first day of April, 1878, the said defendant afforded to the said plaintiff all the said facilities needed by it for the conduct of its express business over the defendant's lines, and such as were specifically provided for in the contract in the bill herein set forth; that thereafter the defendant notified the plaintiff that such facilities would be withdrawn, and that it was the intention and purpose of the defendant to exclude the plaintiff's company from its lines on and after the 25th day of May, 1880; that such intention and purpose were restrained by the preliminary injunction order of this Court, which said injunction order was afterwards modified, as appears in the record.

VII. That it is the duty of the defendant to accord to the plaintiff all express facilities, and to the same extent and upon the same train that said defendants accord to itself or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to plaintiff on all its passenger trains.

VIII. That the plaintiff keep and render monthly a true account of the services performed for it by the defendant, and to pay therefor at the rate hereinafter specified on or before the 15th of each month after the date hereof for the business of the month preceding, and that the defendant has no right to require prepayment for said express facilities, or payment thereof at the end of every train, or in any other manner than as is hereinafter provided; and that plaintiff execute and deliver to the defendant a bond in the sum of one hundred and fifty thousand dollars ($150,000), conditioned well and faithfully to make such payments as is herein provided, and with surety to be approved by the Judge of the Court.

IX. That it is and was the duty of the said defendant to afford and to have afforded such facilities to the plaintiff herein specified for a just and reasonable compensation.

X. Whereas, it is alleged by complainant that since the commencement of this suit, and the service of the preliminary order of injunction herein, the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against complainant, and has charged complainant unjust and unreasonable rates for carrying express matter; therefore it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a Master to take proof and report thereon.

XI. That the defendant, its officers, agents, servants and employees, and all persons acting under their authority, be, and they hereby are, permanently and perpetually enjoined and restrained from interfering with or disturbing in any manner the enjoyment by the plaintiff of the facilities provided for in this decree, to be accorded to it by the said defendant upon its lines of railway, or such as have been heretofore accorded

to it for the transaction of the business of the plaintiff and of the express business of the public confided to its care, and from interfering with any of the express matter or messengers of the plaintiff, and from excluding or ejecting any of its express matter or messengers from the depots, trains, cars or lines of said defendant as the same are by this decree directed to be permitted to be enjoyed and occupied by said plaintiff, and from refusing to receive and transport in like manner as the said defendant is now transporting, or as it may hereafter transport for itself or for any other express company over its lines of railway the express matter and messengers of the said plaintiff, and from interfering with or disturbing the business of the said plaintiff in any manner whatsoever; the said plaintiff paying for the services performed by it for the defendant, monthly as herein prescribed, at a rate not exceeding fifty per centum more than its prescribed rates, for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or corporation, or for private individuals; reserving to either party a right at any time hereafter to apply to this Court, according to the rules in equity proceedings, for a modification of this decree as to the measure of compensation herein prescribed.

It is further ordered, adjudged and decreed, that the defendant pay the costs to be taxed herein, and that an execution or a free bill issue therefor."

Decree in Iron Mountain Case, Record, p. 54.
In Memphis & Little Rock Case, Record, p. 86.
In M. K. & T. Case, Record, p. 73.

Constitutional Provisions of Missouri.

Article XIII., Sec. 14:

Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers. The General Assembly

shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State; and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and to enforce all such laws by adequate penalties.

SEC. 23. No discrimination in charges or facilities in transportation shall be made between transportation companies and individuals or in favor of either, by abatement, drawback or otherwise; and no railroad company or any lessee, manager or employee thereof shall make any preference in furnishing cars or motive power.

Statutory Provisions of Missouri.

SEC. 821. Railways declared highways and companies common carriers—discrimination prohibited. Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers. No railway company or corporation or association shall hereafter make any discrimination in charges or facilities in the transportation of freight or passengers between transportation companies and individuals, nor in the transportation of freight between commission merchants or other persons engaged in the transportation of freight, and individuals in favor of either by abatement, drawback or otherwise, nor shall any such company, corporation or association, nor any lessee, manager or employee of any such company, corporation or association make any preference between the parties aforesaid in furnishing cars or motive power for the purpose aforesaid. And any company, corporation or association or manager, lessee or employee violating the provisions of this section, shall forfeit and pay to the party injured the whole amount of such transportation charged, to be recovered before any Court of competent jurisdiction: provided, that excursion or commutation tickets may be issued at special rates.

SEC. 797. Train regulations—notice to be given—accommodations to be furnished, &c. Every railroad corporation in this State which now is or may hereafter be engaged in the transportation of passengers or property shall give public notice of the regular time of starting and running its cars and shall furnish sufficient accommodations for the transportation of all such passengers, baggage, mails and express freight, as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, at the junction of other railroads and at the several stopping places; and they are hereby required to stop all trains carrying passengers at the junction or intersection of other railroads a sufficient length of time to allow the transfer of passengers, personal baggage, mail and express freight from the trains of railroads so connecting or intersecting, or they may mutually arrange for the transportation of such persons and property over both roads without change of cars; and they shall be compelled to receive all passengers and freight from such connecting or intersecting roads whenever the same shall be delivered to them.

Constitutional Provisions of Arkansas.

The Constitution of Arkansas says, Art. 17: "No discrimination in charges or facilities for transportation shall be made between transportation companies and individuals or in favor of either by abatement, drawback or otherwise, and no railroad or canal company or any lessee, manager or employee thereof shall make any preference in furnishing cars or motive power."

Statutory Provisions of Kansas.

See M. K. & T., Record, pp. 88, 89.

APPELLANTS' SUPPLEMENTAL BRIEF AS TO USAGE AND CUSTOM AND PUBLIC POLICY.

Statement of Facts and Synopsis of Pleadings and Orders bearing on the above Subjects.

It appears from the bill and also from the testimony that the plaintiff was doing business with the Iron Mountain Railroad Company prior to the commencement of this suit, under the provisions of two contracts, one dated the 30th of April, 1872, made between the defendant and the Adams Express Company, and the other dated the 1st day of February, 1874, made between the Southern Express Company on the one side, and the Cairo and Fulton Railroad Company, of Arkansas, and the Cairo, Arkansas and Texas Railroad Company of Missouri, on the other part, the two railroad companies above named having afterwards been merged into the Iron Mountain and Southern Railway Company. By the terms of the first contract it was to remain in force for one year from the 1st of May, 1872, and until thirty days' notice should be given by either party to the other of its desire to terminate the contract; the other contract was to remain in full force from its date "until terminated by either party giving the other sixty days' notice of its intention to withdraw therefrom;"

so that either of those contracts might be terminated at the option of either of the parties to the same.

By the provisions of the first contract the St. Louis and Iron Mountain Railroad Company agreed to furnish the Express Company

"One-half the baggage car on each of its passenger trains on the main line and branches for carrying express freight, not to be loaded with over 7,000 pounds at any one time; and it is further understood, that the Express Company shall have the use of part of the baggage car on accommodation trains between St. Louis and Potosi to an extent not in excess of the amount allowed on passenger trains."

It was further agreed that each of the cars should run each way daily on the passenger trains; that no charge should be made for Sunday. It was further agreed that the Railroad Company should prohibit its conductors, agents and baggage masters from transporting on passenger trains any matter except extra baggage or from accepting compensation for the same; that no other person should do an express business on the passenger trains on better terms than that given to the Adams Express Company, and in consideration of these services the Express Company agreed to pay the Railroad Company $125 per day and a proportional increase per day for every ten miles operated by them on extension of road, for transportation of its messengers with safes and package chests, and an average amount of freight not exceeding 10,000 pounds per day, and for all freights in excess of that amount to pay the Railroad Company once and a half its regular first-class rates for freight as by its freight tariff, but not to exceed 75 cents per 100 pounds for through freight from St. Louis to Columbus, Kentucky. It was further agreed that for all extra cars that the Express Company may require, the Express Company should pay first-class freight rates for all freight carried in them. The Express Company also agreed to carry all money and valuables for the Railroad Company from points on the line of its road free of charge, and all such matter as may be sent or received to points off the line to charge the Railroad Company not exceeding two-thirds of the rate charged the public; the Railroad Company to be exempt from liability for loss

or damage to goods or money transported; settlements to be made on or before the 10th of each month.

IT WILL BE SEEN FROM THE CONTRACT OF APRIL 30, 1872, that the Express Company was to have one-half the baggage car on passenger trains and on accommodation trains; that each car should run each way daily on the passenger trains; that the agents of the railroad were prohibited from carrying anything on passenger trains except extra baggage; that the Express Company was to pay the Railroad Company $125 a day for the transportation of its messengers with safes and package chests, and an average amount of freight not exceeding 10,000 pounds a day; for all freight in excess of that amount the Express Company was to pay the Railroad Company once and a half its regular first-class rates, and the Express Company was to carry the money and valuables for the Railroad Company free of charge; the Railroad Company to be indemnified against loss and damage of goods.

THE OTHER CONTRACT OF FEBRUARY, 1874, stipulated that the Railroad Company was to furnish the Express company one-third of the room of the baggage car of each passenger train for the carriage of express matter, and not to exceed 6,000 pounds per day in each car; that no baggageman or other agent of the Railroad Company should carry on passenger trains any matter except extra baggage; that the Express Company should pay the Railroad Company $50 a day for the transportation of its messengers with safes and package-chests

and an average amount of express matter not to exceed 6,000 pounds per car, over the Cairo and Fulton road, and $10 a day for similar privileges over the Cairo, Arkansas and Texas road; for all express matter in excess of 6,000 pounds on any one train the charge should be 25 cents a 100 pounds per 100 miles; the Express Company to carry all money packages and valuables for the Railroad Company free of charge; the Railroad Company to be indemnified against loss or damage of goods or money transported; the car room allotted to the Express Company to be lighted and warmed by the Railroad Company; settlements to be made on or before the 16th of each month, for the business of the preceding month.

NOTICE HAS BEEN GIVEN to the Express Company by the Railroad Company of its election to terminate the provisions of these contracts at the time provided for in the contract, and the Express Companies informed that the Railroad Company would make other arrangements in regard to the express business on its road at the time of the institution of this suit.

THE BILL of complaint avers that the interests of the Express Company, and the preservation of its value and property and good will, demanded that it shall continue to have and enjoy the daily means or facilities heretofore accorded to it by the defendant and for which it offered to pay a reasonable compensation. The bill avers that it was the intention of the defendant after the time fixed for the termination of the contract to exclude it from participating in behalf of the public, whom it represents, in the conduct of the ex-

press business over the lines of the defendant's railway and to refuse to accord to complainant the facilities and accommodations heretofore and for years past accorded to it, and that such exclusion would take place unless restrained by the order of the Court. The further avers that it was the *legal duty* of the defendant to continue to afford upon its passenger trains and at its depots and stations the same facilities which it had heretofore accorded, or which it may afford to itself in the conduct of its express business.

The plaintiff further claims in the bill of complaint compensation for *accessorial services*, that is, that the defendant could be legally required to deduct from the charges to be made by it to the public for transportation of express matter, upon all express matter transported for the Southern Express Company, a reasonable compensation for the accessorial service rendered by the Express Company beyond and off the lines of the railway of defendant in the collection of goods from shippers or consignors, and the delivery of goods to consignees, by means of horses, wagons, &c.

It further claimed that as a representative of the public, the plaintiff has the same need that it ever had for the daily use and enjoyment of the express privileges and accommodations over the defendant's said railway lines. That the defendant is a *common carrier*, and as such amenable to the jurisdiction of a court of equity; that such Courts have the power to protect all the rights of the Southern Express Company to their fullest extent and to compel the defendant to accord to it all its legal rights in that behalf.

The complainant then asked for an *injunction* to restrain the defendant from interfering with its express

business or its messengers, as the same have been heretofore enjoyed by the complainant, and from refusing to transport the express matter and messengers of the complainant, and from interfering with, or disturbing the business of the complainants, or its present relations in reference thereto in any way or manner whatsoever; and that the defendant be required to afford the complainant the same accommodations upon its trains and on its depots and stations as it accords to itself in the transportation of its own express matter. And that the defendant be *decreed* to make a rebate to be fixed by the Court from its charges to the Southern Express Company by reason of the performance of accessorial service as above specified by the Southern Express Company.

Thereupon the Court ordered that the defendant be enjoined and restrained from preventing the plaintiff enjoying the same facilities in the conduct of its express business permitted to any other express company, or exercised by the defendant itself, on payment of reasonable compensation therefor.

Afterwards, in the petition for a *modified injunction*, the complainant averred that the Court in granting the first injunction intended to secure to the plaintiff the full enjoyment of all needful express facilities over the line of defendant's railway as the plaintiff had theretofore enjoyed the same, and averred that those facilities consisted in free access to vehicles containing express matter, to the stations and cars of the defendant, the transportation thereon, in the custody of messengers and when necessary in safes and packing trunks or chests and baggage cars and by passenger trains, and in the collection of express charges due thereon from con-

signees at the time and place of delivery, and in the payment by defendant for said facilities according to the terms of the contract set forth, to wit: on or before the 10th day of each month for the business of the preceding month.

Thereupon the Court made a further *modified injunction* in accordance substantially with the prayer of the supplemental bill, except that instead of enjoining a compliance with the mode of transacting business according to the terms of the contract between the parties, it enjoined the defendant from preventing the plaintiff enjoying equal facilities in the conduct of its expres business with those permitted to other express companies, or exercised by the defendant itself, with respect to said business, on the payment of reasonable compensation and from charging the plaintiff higher rates of freight than are charged other express companies, and that it exacts for the service of its own express department; the rates not to exceed those now established by the defendant for like services by other parties, or for the conduct of its own express department. It also forbade the listing or disclosure for the plaintiff of the contents of packages, and from preventing the messengers of the plaintiff, on payment of passenger fare, from like accommodations for the care and custody of plaintiff's shipments as are accorded to the messengers of other express companies, or the agents, servants and employees of the defendant engaged in like service.

It will be seen by this synopsis of the pleadings on behalf of the plaintiff, and the orders of the Court, that the plaintiff claimed that it should be permitted

to *carry on its business in the same manner as it had been conducted under the terms of the written contracts, previously existing between them;* whereas, the orders of the Court only required, in substance, that the plaintiff should be treated by the defendant in these respects in the same manner as other express companies were treated, and that it should be treated in the same way and the same accomodations afforded in the conduct of its express business as the defendant accorded to itself. So far the orders do not accord with the prayer of the bill.

THE FINAL DECREE OF THE COURT is printed *ante*, page 7.

The Court does not, in its decree, undertake to determine or define what is express matter, or what is the express business. On the contrary, the Court, in its opinion, says that while it is not possible to give a definition in terms which will embrace all the classes and articles so usually carried, and to define it with words of exclusion, the general character of the business is sufficiently known and recognized as to require the Court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads. That the object of the express business is to carry small and valuable packages rapidly in such manner as not to subject them to the danger of loss and damage, which to a greater or less degree attends the transportation of heavy or bulky articles of commerce.

The Court in its decree undertakes to fix in advance the maximum rates which the Express Company shal

pay and the Railroad Company shall accept, that is, not exceeding fifty per centum more than its prescribed rates for the transportation of ordinary freight.

The Court, in the opinion in the case, further says that,

"Whilst I doubt the right of the Court to fix in advance the precise rates which the Express Company shall pay, and the Railroad Company shall accept, I have no doubt of its right to compel the performance of the service by the Railroad Company, and after it is rendered to ascertain the reasonable compensation and compel its payment."

This was the opinion of Justice MILLER in deciding the case, but the decree, made by Judge MCCRARY, goes far beyond the rule of law asserted by the Court in the opinion.

It may be further remarked that the decree, after fixing the rate of compensation, concludes with this clause:

"Reserving to either party the right at any time hereafter *to apply to this Court* according to the rules in equity proceedings, for a modification of this decree as to the measure of compensation herein prescribed."

THE DECREE (*ante*, p. 9) further provided for the *appointment of a master* to take proof and report upon certain alleged unjust and unreasonable rates of transportation charged by the defendant to the complainant since the institution of this suit; and in pursuance of this portion of the decree, THE COURT DID THEREAFTER, ON THE 5TH OF JUNE, 1882, APPOINT A MASTER PRO HAEC VICE, *to report* what rate was actually in force by defendant against the plaintiff for carrying its express matter, between June 1st, 1880, and 25th of March, 1882; what price in addition thereto was charged for

the fares of messengers in charge of the freight; to *state an account* showing rates and fares between said dates; *to report* what are the statutory rates for the carriage of ordinary freights, and state an account of the same as applied to express freight; *to report* what was, during the same period, a reasonable compensation to be paid to the defendants for allowing plaintiff all reasonable facilities for conducting its express business over its road, the same to be found as a unit, including compensation for express matter and messengers, and what during the same period the plaintiff was required to pay, and has paid, and if such amount exceed a reasonable compensation, to state an account of it; *to state* whether during that period defendant included in its charges for transportation all express matter of the plaintiff, and defining *accessorial service* to include the cost and expenses of collecting and delivering such express matter to the railroad for transportation, and of delivering such express matter to the consignee; to report whether during said period defendant required complainant to pay for transportation of its messengers in custody of express matter other than usual passenger fares; whether defendant has discriminated against the plaintiff by transporting express messengers other than the plaintiff's at less rate than it compelled plaintiff to pay; and to *state an account* of the excess paid by plaintiff; to report whether during the same period defendant *discriminated* against plaintiff by charging and compelling plaintiff to pay for transportation of its express matter higher rates and greater amounts than it charged to others, and to state an account of the same; to report also whether defendant discriminated against plaintiff by refusing

to allow plaintiff to conduct its business on any of defendant's lines, trains and express cars in use during that period on which defendant and others conducted an express business, and whether by such exclusion plaintiff's express matter and messengers were hindered and delayed, and plaintiff prevented from competing with defendant and others, and if so, what damages, if any, were sustained by plaintiff in its business, and to state an account of same.

In that business, and under that order, the Master has been engaged for now nearly three years, and has not yet made his report. Of course as this suit is still pending and undetermined, another reference must be made to the same, or another master to investigate like charges between the rendition of the decree and the time when the Master shall make his final report. In the meantime the business of the Railroad Company is carried on, and the express business of the plaintiff is carried on under the terms of the decree, by which either party may at any time apply to the courts for a modification of the decree as to the measure of compensation, and as to whether the business done between the parties since the rendition of the decree has been carried on according to its terms. It is, therefore, impossible to foretell at what period of time in the distant future the United States Circuit Court for the Eastern District of Missouri will surrender to the parties themselves the management of their own business.

THE DECREE IN THIS CASE, following the suggestions

made by the complainant in his bill and supplemental bill, is based upon two propositions:

> FIRST. That the express business and the rights and privileges of express companies in the conduct of such business have been established as a usage or custom amounting to law; that where it contravenes, and so far as it contravenes, the well established doctrines of the law in regard to the rights and obligations of common carriers it overrides all former rules upon the subject.
>
> SECONDLY. The necessities of commerce, the interests of the public—in other words, public policy—comes to the support of the express companies and enables them in their own interests as for the public good to demand the establishment of the rules maintained by the complaint in this case, and to a certain extent sanctioned by the Court in its decree.

It will be observed further that the *usage claimed and the public policy invoked in this case arise out of written contracts* made between the plaintiff and the defendant, whereby, as it is said, the public has been greatly benefited, and the plaintiff has been induced to expend large sums of money in the establishment of its business, and ought, therefore, to be protected by the Courts.

This doctrine thus sought to be maintained is, we insist, in derogation as well of the statute law as of the common law, and is unsupported by reason or authority.

The testimony shows that in all cases where the express business is carried on upon the lines of particular railways by express companies, now doing business in this conntry, it is in every instance done under the terms of a *special contract*, except in the cases now

in litigation, and in all of these the business is carried on under the permission and orders of the Court after the termination of express contracts between the parties.

I.

Usage and Custom.

So far as the rights of the plaintiff are concerned, they must be based upon usage or custom which is uniform, general and well understood. They can derive no aid from considerations of public policy, as we will undertake hereafter to show. No doctrine of the law is better settled than that no custom or usage, however general, can be put in evidence to vary or control the express terms of a contract.

Sleght vs. Rhinelander, 1 Johnson, 192.
Barlow vs. Lambert, 28 Ala., 704.
Cowan vs. Patch, 4 Cal., 204.
Sigsworth vs. McIntyre, 18 Ill., 126.
Samper vs. Rawlins, 43 Ill., 92.
Randall vs. Rotch, 12 Pick., 107.
Macomber vs. Parker, 38 Pick., 175.
Wheeler vs. Nurse, 20 N. H., 220.
Sweet vs. Jenkins, 1st R. I., 147.

The reason of this rule is obvious, because parol testimony cannot be admitted to impeach the terms of a written contract. If words are used of a doubtful meaning, or which, according to custom, have a particular meaning, evidence may be introduced to show what the usage or common understanding was as to

the meaning of such terms, or it may be shown that a contract was made in reference to some known and well-established custom, because the custom becomes the law of the contract and a part of the contract itself, as in the case of Renner vs. The Bank of Columbia, 9 Wheat., 585, in which it was held that a contract made payable on a certain day was by usage and custom intended to be made payable four days thereafter. In that case the Court says:

"Evidence of usage or custom is received for the purpose of ascertaining the sense and understanding of parties by their contracts which are made with reference to such usage or custom, for the custom then becomes a part of the contract, and may not improperly be considered the law of the contract."

No better definition, perhaps, was ever given of the force and effect of a usage or custom than that by Judge STORY in the case of the schooner "Reeside," 2 Sumner, 559:

"The true and proper office of a usage or custom," says this learned Judge, "is to interpret the otherwise undeterminate intention of the parties, and to ascertain the nature and extent of their contracts arising not from express stipulations but from mere implications and presumptions and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument when the word or words have various senses, some common, some qualified and some technical, according to the subject matter to which they are applied; but I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulation in a written contract, and, *a fortiori*, not to contradict them. An express contract of the parties is always admissible to supersede or vary or control the usage or custom."

"The custom is without force in opposition to positive law."

Cromwell vs. Fosdick, 15 La. An. Rep., 436.

"A custom or usage cannot control the established principles of law."

Strong vs. Bliss, 6 Met. (Mass.), 393.
Home Ins. Co. vs. Mutual Ins. Co., 1 Sandf. 137.
Dewes vs. Lockhart, 1 Texas, 535.

"A usage of factors to pledge the goods of their principal is void, being against a general rule of law."

Newbold vs. Wright, 4 Rawle, 195.

"So a custom of the trade of Philadelphia to allow interest on goods sold after six months."

Henry vs. Ricks, 1 Dall., 265.

"A practice or usage in opposition to the common law, however general it may be, has no force in this country on the ground of custom, because it is immemorial."

Harris vs. Carson, 7 Leigh, 632.
Winder vs. Blake, 4 Jones N. C., 332.

"The usage of banks in Connecticut to regard drafts drawn on them payable at a day certain, as checks, and so not entitled to grace, cannot control the general rules of law."

Bowen vs. Newell, 8 N. Y. (4 Selden), 190.

"A custom to treat a sale at thirty days as a sale for cash is void."

Chapman vs. Devereux, 32 Vermont, 616.

LET US APPLY these principles of law to the case before the Court.

The Southern Express Company is doing business on the line of the Iron Mountain Railroad under the terms of two express written contracts; the mode of doing that business is provided for; an allotted space in a particular car is, by the terms of the contract, set apart to the plaintiff; it is provided that this accom-

modation shall be furnished on passenger trains that shall run each way daily. The Railroad Company denies to itself, its conductors, agents and baggage-masters the right of transporting on passenger trains of any matter except extra baggage, or from receiving compensation therefor. The express freight is to be in charge of a messenger of the plaintiff. The Railroad Company is to be indemnified against loss or damage to the goods transported. Settlements are to be made on or before the 10th of each month. The average amount of freight to be transported per day by the Express Company is not to exceed 10,000 pounds, and for all that is in excess of that amount, the Express Company is to pay one and a half its regular first-class rates for freight according to the tariff of the defendant, and it is expressly stipulated that this contract may be terminated by either party on thirty days' notice. In other words, the express business is to be carried on in a particular way on the road of the defendant and for a special compensation of $125 a day until the Railroad Company or the Express Company chooses to terminate the contract. It cannot be denied, then, that one of the express stipulations of the contract is that it be terminated at the option of either party, and yet the doctrine contended for is that in spite of this provision the defendant is compelled to permit the business to be carried on in the same way and upon the same terms as provided in the written contract after the said contract shall have been terminated. And this is claimed to be usage and custom amounting to the obligations of positive law.

There is, of course, no evidence showing or tending to show a custom, or usage, or understanding on the

part of express companies, or railroad companies, or the public (which seems to be so deeply interested in this matter), that it was understood that at the time this contract was made it really amounted to nothing, but that after its termination the parties could be required to carry on the same business in the same way indefinitely, and that the rules of the common law, applicable to all common carriers, should be set aside and disregarded.

In the case of the Southern Express Company vs. The Nashville, Chattanooga and St. Louis Railway Co., 2 Fed. Rep., 465, Judge BAXTER says: "It was altogether *proper* that the complainant and defendant in view of the magnitude of their business should by special contract stipulate for the facilities to be furnished by one to the other, and fix the terms and conditions upon which the business shall be done, but no right arising to the complainant from public considerations, or the charter obligations of the defendant, was thereby waived. These contracts were in affirmance of the pre-existing legal rights of the plaintiff, and an admission by the defendant that the business proposed was within the scope of its duties and reasonably remunerative."

What pre-existing legal rights does the learned Judge refer to, and what admissions by the defendant that the business proposed was within the scope of its duties and reasonably remunerative?

If it is the right in common with every shipper to have his freight transported by the railroad for a reasonable compensation; this is not denied.

If it is the right to have the express freight transported in a special car, under the charge of a special

messenger, then it belonged to the first expressman who ever engaged in the business, and before it was ascertained, or could be ascertained, that it was a public necessity or public convenience, and before, in the language of the same learned Judge, "the express business had so interwoven itself into the present methods that it could not be dispensed with;" and before, in the language of the same Judge, "it had attained its present enlarged usefulness under the fostering care of the railroads."

As elsewhere shown in this argument, these pre-existing legal rights of the complainant did not exist in England where the mode of transportation by railroad commenced about the same time that it did in this country, and does not exist to this day so far as we are informed.

If these pre-existing legal rights were based on custom, there is no evidence of such custom.

If they are based upon considerations of public policy, or commercial necessity, we say most emphatically that that is no ground for the establishment of a legal right. Courts of justice have no authority by judicial legislation to establish legal rights based upon public considerations, and this brings us to the next question.

II.

Public Policy—Judicial Legislation.

Can the courts of justice, either at law or in equity, establish by a species of judicial legislation legal

rights or impose obligations which may be dictated by considerations of public policy, and which are in conflict with the statute or the common law?

The province of courts of justice is to ascertain rights and give remedies for their violation, and not to originate them. The decisions of this Court are full of the doctrine that it is not for the courts to determine what the law ought to be, but what the law is. The foundation of the power on the part of the State to fix compensation and to regulate rates for transportation is that it is a police power, and, therefore, the State has the right to establish police rules and regulations in regard to it, but such power belongs to the Legislature and not to the courts.

In the case of the Chicago, Milwaukee and St. Paul Railway Co. vs. Ackley, 94 U. S., p. 179, the question was presented whether a railroad company could recover for transportation of baggage more than the maximum fixed by the act of the Legislature of that State, by showing that the amount charged was no more than a reasonable compensation for the services rendered. The Court held that the limit of recovery was the amount prescribed by the statute.

In the case of Peik vs. Chicago Railway Co., 94 U. S., 178, the same question arose.

The Court in that case, as to the claim that the Courts must decide what is reasonable, and not the Legislature, says:

"This is not new in this case. It has been fully considered in Munn vs. Illinois. Where property has been clothed with a public interest, the Legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the Courts as well as the people.

If it has been improperly fixed, the Legislature, not the Courts, must be appealed to for the change."

We do not deny that in the absence of special legislation the Courts may determine what is a reasonable compensation to be paid to a common carrier, because that is the established doctrine of the common law, and the Court in such case is merely acting in pursuance of its authority to expound the law.

We cite those cases for the purpose of showing that the Courts have no authority to change the law.

In the Sinking Fund Cases (99 U. S., 761) the Court announces the doctrine that the interpretation and construction of contracts when drawn in question, belongs exclusively to the Judicial Department of the Government, and that the Legislature has no more power to construe their own contracts with their citizens than those which citizens make with each other, without the exercise of judicial powers, which would be contrary to the elementary principles of our Government.

The case goes on to show the distinction between a judicial and a legislative act. "The one determines what the law is and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it."

In the case of Wayman vs. Southard, 10 Wheat., 146, Chief Justice MARSHALL said:

"The difference between the departments undoubtedly is that the Legislature makes, the Executive executes and the Judicial construes the law, but the maker of the law can commit something to the discretion of the other departments, and the precise boundary of

this is a subject of delicate and difficult inquiry into which the Court will not enter unnecessarily."

And the same eminent Judge, in the case of McCullough vs. Maryland, 4 Wheat., 428, says:

"It is unfit for the Judicial Department to inquire what degree of taxation is the legitimate use, and what degree may amount to an abuse of the power. It is the province of the Judges to determine what is the law upon existing cases, and find the law as applied by one and made by the other; to do the first, therefore, it confirmed the claims of parties that the law of the land before established in its nature a judicial nature. But to do the last, to base new rules for the regulations of new controversy is in its nature a legislative act, and if those rules interfere with the past or the present, and do not look wholly to the future, they violate the definition of the law as the rule of civil conduct.

"It is the province of judicial power also to decide private disputes between or concerning persons, but by legislative power to regulate public concerns and to make laws for the benefit and welfare of the State."

Cooley on Constitutional Limitations (1st Ed.), p. 92.
Merrill vs. Sherman, 1 N. H., 204.

Ex turpi causa non oritur actio is a maxim of the common law and only the common law itself. This maxim is the basis and authority for the Courts to hold that contracts illegal in their nature or against public policy or void, and they are void because they are in violation of this maxim. In other words, in violation of the law, but a rule of public policy which changes the law because the interests of commerce, or the interests of the great mass of people require it is against existing law. In other words, such a rule is not intended to enforce the law as it is, but to make a new law upon the subject.

The power to establish police regulations on the part of the State will authorize the passage of a law to require railroad companies to fence their tracks, to fix the grades of railway crossings, to require that a bell should be rung or a whistle sounded at a particular time. These are police regulations prescribed by the law-making power, but not by the judicial power.

It could hardly be contended that a farmer who is in the habit of crossing a railroad track to go to market could ask a court of justice to require by mandatory injunction that the track should be graded at a particular point, or that a bell or whistle should be sounded at a given time because public convenience or public safety requires that these things should be done.

It is not for us to point out the duties of this august tribunal, but counsel may as officers of this Court be permitted to suggest in the interests of public justice what are the true limitations of judicial power. This Court is the final arbiter of all questions relating to the powers of the different departments of the Government. It can determine what the Legislature may do, and what the Executive can do under the Constitution, but there is no tribunal which can decide what this Court may do. Hence the necessity of exercise of caution in determining how far it may go in the exercise of questionable powers. If the legislative department, or the executive department violates the law of the land, or exceeds the authority vested in it by the Constitution, we can appeal to this Court for remedy. But from the errors committed by this tribunal there is no appeal, except to that perennial and exhaustless fountain of political power which, whilst it may give to each department of the Govern-

ment all necessary powers, may at the same time, as by a deluge, sweep all away departments and all tribunals. It may even undermine the pillars of the Republic itself and leave not a wreck behind.

Now to apply these principles to the case before the Court, it is necessary to inquire what was the common law of public carriers as applied to railroad corporations in this country, and what provisions of the statute law apply to the operation of those companies. By the doctrine of the common law a common carrier could be required to transport all goods offered for transportation for a reasonable compensation, the question of what is reasonable or unreasonable to be left to the determination of the courts. Whilst the carrier might make discriminations, it could not make unjust discriminations. It is required to afford to each shipper equal facilities, although it could not be required to exact the same charges for transportation, but so far as the facilities for transportation are concerned it must treat all alike. It could hardly be pretended that every shipper of cattle or goods, or other produce by a railroad, could demand that the owner should have a separate car and have the sole control and management of his own goods. Whilst the Railroad Company might be authorized to grant such a privilege, it could not be required to do it.

The Constitution of Missouri, the State where this railroad corporation is chartered (*ante*, p. 84), provides that the General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger tariffs on the different railroads in the State, and shall from time to time pass laws establishing a reasonable maximum

rate of charges for transportation of passengers and freight on said railroad.

This provision of the Constitution, while it admits that there may be a discrimination, forbids unjust discriminations and extortions in rates, and it is left to the General Assembly to determine what is and what is not unjust discrimination.

THE GENERAL ASSEMBLY OF MISSOURI has passed no law upon the subject of rates, except one fixing the maximum of charges for ordinary freight, which is to be transported upon freight trains. It has made no provision in regard to the charges to be made for the transportation of express matter on passenger trains, but it does provide (*ante*, p. 85) that no railway company shall make any discrimination in charges or facilities in the transportation of freight or passengers between transportation companies and individuals, nor in the transportation of freight between commission merchants, or other persons engaged in the transportation of freight and individuals, in favor of either, by abatement, drawback or otherwise, nor shall any such company or corporation or association make any preference between the parties aforesaid in furnishing cars or motive power for such purposes.

Now, it will be seen, that there is here no prohibition against making discrimination between corporations, or between individuals, or between commission merchants, nor is there any prohibition against making a preference between individuals or between commission merchants, or between corporations or other railway companies. The prohibition is in behalf of the individual against these companies and not amongst themselves. In other words, no railroad company shall

make a discrimination or give a preference to another railroad company, or to another corporation, or to another association over any individual shipper; nor shall it give a preference or make a discrimination between commission merchants and other persons engaged in that business, but it does prohibit the Railroad Company from giving any preferences to a corporation of any kind, or association of any kind, or transportation company of any kind, and any individual in the community.

Now let us ask how can the provisions of this law authorize a railroad company to give to an express company, or any other transportation company or association, preferences or discrimination between said company and the individual shipper? On the contrary, the statute expressly prohibits it, and it seems as if it was especially intended to meet a case like the one now submitted to this Court. Could a railroad company be required to give to every shipper of produce a place in a baggage car or express car, and be allowed either to take charge of his property himself or to put it in the custody of some agent? If so, the benefits of transportation by rail would necessarily be denied to the great mass of the community, and the conveniences and benefits which the public derives from this mode of transportation would be destroyed.

Railroad companies are common carriers. They are under the same obligations to the public as other common carriers. The State may, because of the extraordinary power and facilities given to these companies, be authorized to exact the most stringent regulations in regard to freight charges and the modes and facilities of transportation; but why they should be required

to give greater facilities to corporations and associations engaged in the business of transportation than they do to each individual citizen cannot arise from any special favors granted by the State to railroad companies. Certainly not in the absence of special legislation directed to that end.

But the question in this case is not what the railroad companies may be required to do on behalf of the State, which represents the whole community, but what they may be required to do in behalf of a particular company or association, which in the name of the State claims that it should be furnished with facilities not granted to other citizens. The construction of railroads has been encouraged by liberal grants of power to such companies; but it must be conceded that the enterprising individuals who have contributed their means and their talents to the work of supplying such public necessities as are furnished in this mode of transportation, are entitled to the same protection of the law as other individuals, and that their rights of property are to be guarded by the same rules. Railroad companies, like other companies, are entitled to what their charters have given them, and bound by what they prescribe; and whatever contract of exemption from certain liabilities the State may make with them in the enactment of their charters they may justly claim as rights which the Courts cannot take away. It is because they are public necessities and meet public wants that cannot be otherwise supplied, that the State has given them the power to condemn private property, and to that extent and for that purpose they are the agents of the State; but to say that the public can require of them other burdens than

those imposed by their charters, or that the Courts can by *judicial legislation* create new obligations which they never assumed when the companies were formed, is to claim that the State is entitled to another and further consideration than that which moved the State to grant the charter in the first instance, and is in fact a consideration which the State never demanded, but which the Courts are asked to impose without authority of law.

Railroads have been declared to be highways and railroad corporations common carriers. So far as the companies themselves are concerned, the declaration made that they are common carriers subjects them to the same liabilities, and gives them the same rights with other common carriers. No more, no less. They are public servants to this extent and no farther, unless there be some provisions of their charters requiring them to do what other common carriers are not required to do under the laws which are applicable to common carriers in general.

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In Supreme Court, United States.

OCTOBER TERM, 1885.

THE EXPRESS CASES.

Notes for Oral Argument of JOHN F. DILLON, *in behalf of the Appellant Railway Companies.*

Powers and Duties of the Railway Companies.

In this country railway companies are common carriers for the transportation of persons and property.

Legislative authority to construct and operate a railroad implies, even where it is not expressed, the power and duty to act as common carriers of persons and property thereon. It also implies the power to fix and determine all reasonable rules and regulations uniform and general in their character, that is, applicable alike to all persons composing the public to which the service is due, in respect to the mode in which their business shall be transacted.

Sargent vs. B. and L. R. R., 115 Mass., 416, cited in Appellant's Brief, p. 23.

It also implies the power to fix and determine such compensation for the service to be performed as the directors may determine.

subject to but one qualification, viz.: that such compensation shall not be unreasonable or extortionate. Any further restriction upon their powers of control and management and to fix rates must be found in some constitutional or statute provision.

In the case of the *Memphis and Little Rock Company*, one of the appellants, the charter, section 6, declares "*that the company shall have the exclusive right of transportation.*"

The *Cairo and Fulton Charter* (Iron Mtn. Record, p. 379, Secs. 6 and 7) gives the directors of the company the amplest "powers and authority of control and management of the affairs of the company" (Sec. 6), and express power "to establish such rates of toll for the conveyance of persons and property upon the same as they shall from time to time determine" (Sec. 7). By consolidation the Iron Mountain Company succeeds to the powers and rights of the Cairo and Fulton Company.

In MISSOURI the Constitution declares railways to be "public highways and railroad companies common carriers" (Art. 13, Sec. 14. See also Sec. 23. Both reprinted in Appellant's Brief, pp. 84, 85). In Missouri the powers and duties of railway companies are also minutely declared and regulated by statute.

1 Rev. Stats., Mo., 1879.

Ib. Sec. 765, p. 127, clause 6, gives power to transport persons and property and to receive reasonable compensation therefor.

Sec. 802, p. 137, duty to receive, transport and deliver freight.

Sec. 812, p. 140, duty to receive, transport and deliver *grain* in bulk.

Sec. 814, p. 141, provisions as to time and facilities to enable consignees of *grain* to receive the same direct from the cars of the company.

Sec. 815, p. 142, discrimination between shippers of *grain* prohibited.

Sec. 821, p. 143 (reprinted in Appellant's Brief, p. 85), prohibits discrimination by railway companies between other transportation companies and individuals.

Sec. 832 limits and regulates passenger rates.

Secs. 833 and 834 classify freights and regulate freight tariffs, but do not regulate or limit charges for transportation of express matter.

Sec. 835 prescribes penalties for violation of the act, but confers no equity jurisdiction.

Statutory provisions of Kansas, printed in M. K. and T. Record, pp. 88. 89.

Other statutory provisions of the same general character as those in Missouri.

See Compiled Laws Kansas, 1879, p. 225, Secs. 55–60.

Constitutional Provision in Arkansas.

Appellant's Brief, p. 86.

Statute provisions in Arkansas limit passenger rates and regulate freight transportation, but do not touch the transportation of express matter.

Genl. Stats. Arkansas.

Sec. 4993, par. *tenth*.

Secs. 4994–4998.

Remedy is by action at law.

Sec. 4998.

Railroads require a large investment of capital to construct and are expensive to maintain and operate.

The capital necessarily required, and actually employed, in doing an express business on the appellant's roads. and elsewhere, is relatively insignificant.

The Iron Mountain was originally 685 and is now 923 miles long. Completed March 20, 1874 (pp. 771, 779). It cost more than $53,171,535.27. It has a bonded debt of $35,564,337.91. It cost over $30,000 cash per mile in original construction (p. 779). Stock, $22,082,445.

It has about 140 stations (p. 911), and only two considerable towns, St. Louis and Little Rock.

Only three stations where the plaintiff Express Company had separate agents (p. 911), *and rendered so-called "accessorial service."*

It has steep grades 100 feet to a mile, runs through sparsely inhabited region, and is an expensive road to operate. Cost 25 per cent. more to operate than Eastern roads.

Morley's Ev., pp. 773, 778, 781.

The Memphis and Little Rock is 135 miles long. Costs $4,000,000. Has never paid a dividend. Two or three times in hands of Receiver, and now is.

The Missouri, Kansas and Texas is now about 1,369 miles long. Stock, $46,405,000. Bonded debt, $39,120,000. Non-dividend paying. Was in the hands of a Receiver and Trust Company from 1874 to 1880.

A railroad company has but one source of revenue from which to pay its operating expenses, its fixed charges, and to make returns

on this large investment, viz., its earnings from the business of transportation.

Earnings are the life-blood of every such company.

Such a company has and must have the power to secure, hold and increase its business in all legitimate ways. It is surrounded with competitors on land and water, and the ability to defend, hold and protect its business cannot be impaired without danger of causing bankruptcy.

Every railway company must be both vigilant and militant as the price of its prosperity and existence. If it can't protect itself against rivals, it is undone.

Sources of Revenue of a Railway Company.

There are only four sources of revenue of a railroad company. These are, *first*, the transportation of passengers and their accompanying baggage; *second*, the transportation of the United States mails, and the postal employes; *third*, the transportation of property on passenger trains commonly called the express business, and *fourth*, the transportation of property on freight trains.

Each of the appellant railway companies maintains that it has the chartered and lawful right to conduct the business of transportation of persons and property in such manner as to its directors shall be most conducive to its own interest, the only limitation being that it shall not make unjust discriminations in rates or facilities or unreasonable charges.

Accordingly the company may determine, acting of course in good faith, how many trains shall run daily, and which shall be used for passengers, and which for freight and which for express matter.

To fix and determine rates is the most vital of all the powers of the corporation, and the one whose exercise in view of its relations

to the public and to rival companies is the most difficult, complex and delicate. It it necessarily committed to the trained experts in railway management, who, as representing competing interests, exercise a sleepless vigilance and a constant struggle with each other.

Principles underlying Railway, Passenger and Freight Tariffs, and Freight Classifications.

A railway company's fixed charges, *i. e.*, interest on its debt and taxes, are just as much if a company runs no trains as if it does. These must be provided for. Operating expenses, including salaries and wages, must be met. Earnings are the only source. The company will ascertain as near as it may how much its passenger earnings will be for a year, and how much will be its earnings for mail service. This leaves the earnings from freight service to be ascertained. When you divide the amount of money still required by the company to meet its charges and expenses by the number of tons of freight the company may reasonably expect to carry in a year, you ascertain what each ton carried should contribute. It is then seen that some of the freight will not bear the average rate, and that if that rate were charged it would not be shipped at all, but at a reduced rate it would be. This makes it necessary that other freight shall be charged above the average rate. Rates are fixed largely with reference to the kind and value of the goods. Lower classes of freights, such as sand, iron, brick, go very cheap. Silks are charged more than calicoes. Gold more than lead. Bulk is also an element.

Charges are not alone based upon the expense of doing the work of transporting any given article including a profit therefor, but

upon the *value of the service* rendered to the shipper. Competition is also a most important element in railway tariffs.

What the matter carried will reasonably bear is what practically guides the fixing of the rates. The United States charges for carrying the same weight of letters several times more than for the same weight of printed matter.

Express business; Express matter; Express facilities, and Express Companies.

The bills, the proofs and the decree, use these four terms, and the case requires us to ascertain with precision their several meanings.

The bills are based upon the theory that this is a new business, which railway companies are "not only unwilling, but unable to perform" (Bill, Iron Mtn. Case, page 2, par. 2), which new business has been created and built up by the express companies (Fargo, p. 1025), and is their property, and which it is falsely charged the railway companies are seeking to destroy.

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*Express Business. *Extract from Am. Encyclopediæ.*

"Express, a messenger or conveyance sent on any special errand, particularly a courier dispatched with important communications. In the United States the word is applied to a system organized for the transportation of merchandise or parcels of any kind. This system was originated March 4th, 1839, when agreeably to announcement published for several days in the newspapers, Mr. William F. Harnden, of Boston, made a trip from that city to New York as a public messenger. His route was by the Boston and Providence Railroad and the Long Island Sound steamboat, which

Definition of Express Business.

EXPRESS BUSINESS, *whether conducted by an individual or a partnership, like the Adams or an independent express company, or by the Railway Company through its express department, is noting but a branch of the business of transportation, with the peculiarities following:*

1. It comprises the carrying of both persons (messengers in

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connected with that line. He had in charge a few booksellers' bundles and orders, and some brokers' parcels of New York and Southern and Western bank notes to deliver or exchange—a service for which he charged an adequate compensation. Mr. Harnden also proposed to take charge of freight and attend to its early delivery. For this purpose he had made a contract with the above-named railroad and steamboat companies. He was to make four trips per week. The project recommended itself to business men, especially those whose communications between the two cities were frequent. It was particularly acceptable to the press, to which Mr. Harnden made himself very useful in the voluntary transmission of the latest intelligence in advance of the mail. A year later (1840), a competing express was started by P. B. Burke and Alvan Adams, the ownership and sole operation of which soon devolved upon the latter. In 1841 Mr. Adams associated with him William B. Dinsmore in Boston, as his partner, and gave him the charge of their New York office. Adams & Co.'s Express was carried by the Norwich and Worcester route."

New American Encyclopediæ—word "Express."

History of Adams Express Company.

Thompson Ev., I. M. R., p. 1074.

"The express companies came into existence prior to the charter of these [railway] companies as a regular branch of the industry of the transportation over all manner of instrumentalities for transportation on public highways."

JUDGE CAMPBELL'S Brief in this case, p. 57.

charge) and property, commonly called express matter, the latter in the immediate custody of the former.

2. The carrying of such persons and property in separate cars or compartments on a passenger train.

All else, such as collection and delivery, are not the essence of the business—but only relate to the means of securing it and making it profitable. ☞ The essence of the business is the transportation in passenger trains. The custody of the messenger is only different in degree from the custody of the freight conductor on freight trains.

In support of the foregoing definition or description of the express business, see

Mr. Justice MILLER'S observations, Iron Mtn. Record, pp. 62, 63.

MENDENHALL, Supt. Ex. Dept. O. & Miss. R. R. Co.
Iron Mtn. Record, p. 860.

SOPER, Supt. Iron Mtn. Road.
Iron Mtn. Record, pp. 910, 921.

FARGO, Supt. Am. Express Co.
Iron Mtn. Record, pp. 1011, 1012, 1013, 1014.

BABCOCK (Treas. Adams Co.).
Iron Mtn. Record, p. 936.

LOVEJOY, Supt. of Adams.
Iron Mtn. Record, pp. 1040, 1041.

MR. DEFUNIAK'S testimony and Mr. FARGO'S comment.
M., K. & T. Record, pp. 148, 149, 150.

The Appellees went upon the Appellant's roads under express contracts which, on their face, gave the railway companies the right to terminate the contracts on notice, which notice was given.

Copy of contract of the Iron Mtn. Co. with the Adams Co. of April 30th, 1872, is set out in the bill.

I. M. Record, p. 6.

Copy of contract of Iron Mtn. Co. with Southern Express Co. is set out in the bill.

I. M. Record, p. 7.

Copy of contract in Memphis & Little Rock case.

See M. & L. R. Record, p. 37.

Copy of contract in M., K. & T. case.

See M., K. & T. Record, p. 9.

The proofs establish the fact that from the beginning express companies have invariably occupied railroads only by virtue of express contracts.

MR. JULIER, plaintiff's witness (Superintendent of the American Express Company) I. M. Record, page 566, says:

"We [that is, the American Express Company] run over 28,000 miles of railway in this country."

"Q. 49. *Now please state if you are doing business over any one of those roads without having a contract.*"

"A. *No, sir.*"

Page 570. "Q. 115. You are not transporting matter over any railroad where there exists no express contract between the railway company and the express company?"

"A. *No, sir; we are not doing business over any road unless we have a contract, either written or verbal.*"

MR. WIER, plaintiff's witness (Assistant Superintendent Adams Express Company), page 577, I. M. Record:

"Q. 27. In addition, I will get you to state if all your carriage (that is, the Adams Express Company) upon the railroads for years past has not been under *stipulations or contracts* with railroads.

"A. *I believe with all of them.*"

"Q. 28. Without exception?"

"A. Yes, sir, either written or verbal."

MR. FARGO, plaintiff's witness (Superintendent American Express Company), page 1016, I. M. Record:

"The American Express Company's *contracts as they exist to-day include about two hundred different organizations, covering about 28,000 miles of line.*"

Page 1021, question 57. "Does the American Express Company operate any line of railroad or steamboats except under a contract in writing or some precise verbal contract specifying the accommodations to be furnished, the rates to be paid therefor, as well as the duration of the contract and the conditions upon which it may be terminated?

"A. We occupy a great many lines on an understanding between the two as to the rates we are to pay and the facilities to be furnished, without any agreement as to how and when the arrangement is to terminate.

"Q. 60. Does the American Express Company claim and exercise the right to abandon its operations upon the lines of any railroad or steamboats whenever it deems it its pecuniary interest to do so, or whenever it chooses to do so?

"A. It would, except they are under contract preventing."

MR. LOVEJOY, plaintiff's witness (Superintendent of the Adams Express Company in Philadelphia), pages 1042 and 1044, enumerates a great number of contracts between express companies and various Railroad Companies giving some of their provisions in detail.

MR. BABCOCK, plaintiff's witness (Treasurer Adams Express Company), page 937:

"Q. 932. Has not the Adams Express Company contracts or understandings of some sorts with the various railroads, steamboats and stage lines of which you have spoken for the conduct of the express business and affording the usual and necessnry facilities therefor by said companies?

"A. They have."

In answer to question 35, page 937, he instances some of the contracts.

Three Kinds of Contracts.

As shown by the testimony of these witnesses, the contracts of express companies with railroad companies are of three classes:

FIRST. *By the day or year, i. e.*, for *space*, with provisions to pay for any excess of weight beyond a stipulated amount. The contracts between the parties to these suits were of this class.

SECOND. *By weight*, that is, *tonnage* contracts—so much per pound. The amount which may be carried is limited or fixed by the contract, and the *tonnage basis* is the one adopted by the decree in these cases, although the *opinion* treats "express matter as small and valuable packages" (MILLER, J., par. I. of opinion. I. M. R. p. 62).

[The decree, McCRARY, J. (*Ib.*, p. 54), bases the compensation upon *tonnage* and limits it to not exceed fifty per cent. of the rail-

road company's rates for the transportation of ordinary freight, not first-class freight, but ordinary freight.

Effect of This. I. The railroad company gets no pay for the messenger carried; 2d, gets no pay, or next to none, for small or valuable packages.]

THIRD class of contracts, viz., *percentage contracts*, based upon a percentage—division of the earnings or gross receipts of the Express Company.

LOVEJOY, plaintiff's witness, page 1042, answer 27; page 1045, answer 29; page 1050, answer 46.

It will be observed that scarcely any two of the contracts are alike, and the reason is that the situation and circumstances of no two roads are alike as respects local and through business, competitive and non-competitive business, and the character of the business on the road and of the region tributary to it, etc., etc.

It thus appears that all custom or usage on the part of the Railway Companies, whereby the Express Companies have been enabled to carry on their business as a distinctive business on the railways, has in all instances been based upon special contracts to that end, and not upon any supposed legal duty, to this effect, resting upon the Railway Companies.

What is distinctly claimed to be express business in this country, is in England and Europe done by the Railway Companies themselves. They do not transport goods in the custody of any one except their own agents and employes.

Judge REDFIELD'S View, 2 Am. Ry. Cases, p. 70; reprinted, Appellants' Brief, p. 15.

Definition of Express Matter.

EXPRESS MATTER *is any property carried by an individual, a partnership, an express company, or by a railroad company on passenger trains in the custody of a messenger or attendant.*

What does Express Matter embrace?

Mr. Justice MILLER's opinion: "Not possible to give a definition in terms."

Iron Mtn. Record, p. 62.

Where is the line of demarcation which distinguishes it from "the large mass of freight usually carried on steamboats and railroads"?

As the decree (p. 55) declares and enforces "the duty of the defendant to carry *express matter* of the plaintiff's company," it is obvious that the railway company must know what is "express matter," and what is not.

The testimony clearly establishes the fact that the boundary line between express matter and ordinary freight is ideal, illusory, undefinable, has never been drawn and never can be, since the express companies claim the right to transport any and everything as express matter, irrespective of size, weight, value or character, for which the owner will pay the increased cost of passenger train transportation in charge of a messenger. The only limit being the cost of the service, and the capacity of the passenger train for this service being limited, the Railway Company must have the power, acting in good faith, to determine its capacity to render the service and the value of it.

***Bill of complaint* describes the different classes of express matter.**

Iron Mtn. Record, p. 2.

PLAINTIFF'S WITNESSES DESCRIBE EXPRESS MATTER:

MILLER, commission merchant, St. Louis.

I. M. Record, p. 315, Ans. 16–17.

HAGGETY, commission merchant, St. Louis.

I. M. Record, p. 322, Ans. 11–14; *Ib.* 324, Ans. 38; *Ib.* 325, Ans. 51–55.

WOODWARD, transportation business.

I. M. Record, p. 237.

Three to five tons express matter frequently carried.

Ans. 6–7, p. 237.

ALBRIGHT, p. 528, Plaintiff's St. Louis Agent.

Average value of a ton of express matter, $1,000 to $1,500.

Oyster trains, Ans. 10, p. 238.

FARRELL, St. Louis, merchant.

Ans. 12–15, I. M. Record, p. 336.

OSTRANDER, St. Louis, plumber.

I. M. Record, p. 461.

Shipped by defendant's express, 3,200 lbs. gas pipe, after getting rates from it and the plaintiff.

Shows that the *demand* determines whether matter shall go by express or freight.

Ans. 10, p. 461; Ans. 6 to 9, p. 463; Ans. 27, p. 465.

Hailstorm at Scuyler, Neb., broke all the window glass; result, near a car of glass went by express instead of freight.

Beer. (Not light or valuable matter.) Keg of beer weighs one hundred pounds. Value, $4.50.

Empty keg weighs 40 lbs.; worth $2.00.

Plaintiff complained that we returned empty kegs free, while we made plaintiff a return charge on empty beer kegs, and forced a hearing and took twelve affidavits.

BUTLER (our witness), p. 793, "anything to be transported quickly."

LOVEJOY, Supt. Adams Express Co. Whatever is sent by passenger trains.

I. M. Record, pp. 1040–1041, Ans. 9–12.

Instances of contracts, pp. 1043–1044. Oysters, fish and fruit, either railroad or express, pp. 1047–1055.

O'BRIEN, Supt. Southern Express Co. Fruits and vegetables. I. M. Record, p. 1116, Ans. 40.

SOPER, p. 912.

AIKEN (defendants' agent), p. 891.

MORLEY, p. 777.

Money and amount, p. 1116, Ans. 41 (O'Brien).

FARGO, Supt. Am. Express Co. I. M. Record, p. 1011. *C. O. D. business*, p. 1013; *collection business*, p. 1014; *amount of money carried*, p. 1018, Ans. 39; *live stock*, etc., p. 1014, Ans. 15–17. Form of three kinds of receipts, p. 1015.

FARGO'S confession of how the Express Companies fix tariffs competitive with those of the Railway Company, p. 1023, Ans. 65.

The bill of complaint states, therefore, what the express matter is, viz., anything that the Express Company chooses to carry on passenger trains. If there is a contract the only limit as to what shall be carried as express matter, is the car or cars or space, unless such other limit be found in the terms of the contract itself.

But under this decree there is no limit to the demands which the Express Company may make, except the physical capacity of the road.

Express facilities as claimed by the Express Companies.

The "Facilities" claimed by express companies are defined in the 3d and 4th paragraphs of the supplemental bill. I. M. R., p. 41.

Appellant's Printed Brief, p. 19.

They are also described by the plaintiff's witnesses:

LOVEJOY (Supt. of Adams Co.).

I. M. Record, p. 1041, Ans. 13–15.

FARGO (Genl. Supt. American).

I. M. Record, pp. 1011, 1012.

O'BRIEN (Supt. South. Ex.).

I. M. Record, pp. 1111, 1112.

Contract with Cairo & Fulton.

I. M. Record, pp. 7, 8.

EXPRESS FACILITIES, as defined by the express companies, mean the following:

1. Exclusive car or car space sufficient to accommodate the largest amount of business that may be offered, and transportation of messengers.

2. To heat and light car, and keep it in order.

3. Use of Railway Company's depots and platforms at terminal and intermediate stations to store, receive and discharge express matter.

4. Free access of Express Company's employes and wagons to depot and cars, and placing cars convenient to load and unload.

5. Stopping at intermediate stations for the delivery and reception of express matter.

It is decreed (Par. VIII., p. 56), "that it is the duty of the defendant to afford to the plaintiff all *express facilities*," &c.

The car space thus required to be furnished is absolute. It cannot be known before the train starts just how much of such space will be required on that particular train, and the space thus reserved cannot be occupied or utilized by the Railway Company for any other purpose; and if the Express Company does not occupy

it, or only occupies it in part, the compensation of the Railway Company is diminished thereby, and it has by the decree no guaranty from the Express Company.

Storage facilities claimed.

AGEE (their witness), pp. 389, 390; X 421, 422.

BUTLER, our agent, no room, pp. 798–9.

Express Companies defined.

AN EXPRESS COMPANY *has the same status or legal rights as an individual or a copartnership engaged in the same business. An Express Company is a transportation company. It is a carrier over its own lines, and a forwarder over other lines.*

The evidence shows that there are no two competing independent express companies upon any considerable line of railway in the United States, except the companies which are parties to these three suits and to suits since commenced.

FARGO, p. 1025.

JULIER, p. 569.

The leading express companies have *partitioned* among themselves the United States, and allotted to each in severalty its territory.

This is euphemistically expressed in the bill in the M., K. & T. case.

M., K. & T. Record, page 4, par. X.

THE ADAMS COMPANY, by agreement with the U. S. EXPRESS Co. and the AMERICAN, referred to in the bill, was to come to St. Louis, but not to do business north of a line west of St. Louis. Hence provision in the M., K. & T. contract with Adams, limiting it to

business on the M., K. & T. *south* of Sedalia, *north* of Sedalia on the M., K. & T. was given to the United States Express. The territory of the Adams comes south to the Ohio and Potomac, and before this the Adams Company occupied the entire South without a competitor.

I. M. Bill, p. 4, par. VII.

The territory of the Southern Express Co. (according to the geography of express companies) is bounded on the north by the Adams, and embraces the entire South without a competitor, with the exception of Texas, which plaintiff controls through the Texas Express Company, having the same president and manager as the Southern Express Company.

I. M. Record, p. 1125.

Hence the Iron Mountain contract was made with the Adams (p. 7); the Cairo & Fulton contract with the Southern Express Company.

There being no competition among the express companies, any such company can dictate to a given railroad company the compensation which it will pay for the privilege of doing business on its lines.

In 1879 the receipts of the Iron Mountain Company from the Southern Express Csmpany, under the contracts, did not equal the actual expenses of hauling the car 2,200 miles a day; weight, 30,000 or 35,000 lbs.; an ordinary train consists of baggage, mail, express, two passengers, sleeper.

MORLEY, 776, 786.

SOPER, p. 915.

Hence the defendant company terminated its contracts with the plaintiff, and resolved to do what is called an express busi-

ness on its own account, which it has since done at reduced rates to the public, not less than 33 per cent. with safety and satisfaction to the public, and with increased revenues to the Railway Company.

KERENS, pp. 741, 742.

MORLEY, p. 774.

Why railroad can do it cheaper. It utilizes its ordinary force; same agents at all but three out of 141 stations.

TALMAGE, p. 901.

SOPER, p. 911.

AIKEN, p. 586.

THE SOUTHERN EXPRESS COMPANY, by reason of its occupancy of competitive lines of railway under contract arrangements, is interested to divert, and in point of fact, under the injunction order and decree, does *divert* business from the Iron Mtn. road, which belongs to it, against which diversion the decree contains no prohibition, while the decree at the same time disables the Iron Mountain to prevent it.

The Iron Mountain road is shortest route to Texas and the Southwest; and has a good line to Cairo (an important local point) and Columbus, which are entrepots for Southern business east of the Mississippi River.

See Map.

THE CAIRO SHORT LINE and TEXAS AND ST. LOUIS RAILWAY form a direct competitive line from St. Louis to Cairo and Texaracana, which line is occupied by the Adams and Southern Express Companies, whereby these express companies are enabled to carry busi-

ness for points reached by the Iron Mountain road without using that road, thereby diverting business from it.

AIKEN (Palistine incident), pp. 889, 890, X 895, 896.

THE SOUTHERN EXPRESS COMPANY is by the decree under no obligations to give any business to Iron Mountain Company, and by its contract arrangements its interest is to take the business for the South and Southwest on its other lines.

So on Memphis and Little Rock road: Memphis is an important commercial point. This decree enables the Southern Express Company to divert from the Memphis and Little Rock Company every pound of express matter destined for Texas and the West.

See Map.

So on the M. K. and T.: Contract with Adams Company (M., K. and T. record, p. 9) contained clauses securing business to the Railway Company and prohibiting the Adams from diverting business from it, via Atlantic and Pacific, now St. Louis and San Francisco.

M. K. and T. Record, p. 9.

See Map.

Since the decree, the Adams takes off of the M., K. and T. at Viniti all of the through business and gives it to the St. Louis and San Francisco, which it occupies.

The Adams has no line out of St. Louis through Missouri to the Southwest, except the St. Louis and San Francisco, which it uses for all *through* business North and South, to the direct and palpable injury of the M., K. and T.

Under the contract, when it existed, the Railway Company had some protection.

Under the decree it has none.

Decree requires "same facilities" *in perpetum*.

M., K. and T. Record, p. 77.

Supplemental decree sets everything afloat.

M., K. and T. Record, pp. 73, 74.

To prevent such diversion of business and to secure to the railway companies their fair share of competitive business, they ought not to be *handicapped*, as they are under the decrees appealed from.

It has been truly said by an eminent counsel on the other side in another case, that "the essential feature in the management of industrial and commercial business *is the faculty to direct and control*." This includes the power of a railway company, not only to direct and control the business that is brought to its stations, but to put forth all proper energies to secure business and to prevent it from being diverted by its rivals.

In the sharp and severe competitions which everywhere exist in the business of transportation, it is essential to the prosperity, if not the existence, of every railway company, that it shall have, within legal limits, the utmost freedom of action, both as to the means of securing business and as to the rates which it will charge. Upon the company's freedom of action in these respects, which the law wisely allows, the common law has placed but one limitation, viz., that the company shall not charge unreasonable rates; and the legislation of the States which created the appellant companies has only required that they shall not discriminate in facilities or rates in favor of transportation and express companies as against individuals.

If the principle of the decrees in these cases is sustained, it will be expanded and applied to many other cases, such as Freight, Cattle and Grain despatch companies, to Sleeping Car companies and

the like, thus imperiling the vast investments in railway securities, and threatening the companies with ruin.

No business is more complex than that of railway management. The traffic department of a railway company requires to be under the management of trained experts. The adjustment of tariff rates requires a kind of knowledge and experience to which judges are entire strangers.

For the purpose of getting business railway companies establish agencies, and appoint and employ agents not only along the line of the road but at points and places off the line. All great railway lines in the United States have such agencies in New York, Philadelphia, Baltimore and Chicago, &c. The agents thus employed are under the control of the company. The express companies set up the extraordinary pretension that they have the lawful right to try to secure such business, and to allot such portion of it to the railway company as they see fit, and that the railway company shall transport business thus offered at a mere fraction of the charge that it would make to the public. If the Iron Mountain Company, through its agents in the City of New York, secures business, such business is sure to go over the Iron Mountain Road. If the Southern Express Company secures business through its agents in New York City, it sends such business over the Iron Mountain Road, or, at its pleasure, over any other road, or by boat, if destined for Little Rock. And when sent by the Iron Mountain Road, the express company claims that the railway company is only entitled to receive about forty per cent. of what the express company charges the general public.

The principle at stake is well illustrated (assuming it as correct for the argument) by the statement of the express company as to their earnings, expenses and profits. They say that forty per cent. of their gross earnings is a full and adequate compensation to the rail-

way company for the facilities furnished and the services performed by it. That all the expenses of the express business amount to forty per cent. more, leaving twenty per cent. profit. Now, the railway companies can do the business at the same expense, and thereby save for their stockholders twenty per cent. of the gross revenues of the express company, increasing the revenues of the railway company, as derived from this source, fifty per cent.

We maintain that it is unfair and unreasonable to require, as the decree does, a railway company, doing an express business, to charge a rival independent express company less than the railway company charges the public for doing the same kind of business.

A brings to the railway company a given number of packages, and pays the railway company so much for the transportation. The express company brings a like number for transportation and says, "You must transport these for us for forty per cent. of what you charge A for the like services and transportation." On what principle is the railway company bound to do this in favor of the express company that is under no obligation to bring it business?

Rival and competitive relations between express companies and railway companies further shown.

Government directors refused to allow the Union Pacific to let the express companies on its road, and required the company to do and it has since done its own express business.

Govt. Directors' Report, 1877, p. 723; *Ib.*, 1879, p. 7.
U. S. R. R. Com. Rep., 1879, p. 30.

MR. FARGO (page 146 M., K. & T.; 1014 I. M. Case) says that about *forty per cent. only of the revenues of the express business* arise from the transportation of goods, wares and merchandise, and the remaining sixty per cent. arises from the rendition of the other services which he indicates, that is, C. O. D. business, executing orders and transmitting moneys, deeds, &c., that is, articles that practically have no weight. Having no weight, the result is that under the decree, which bases the compensation to the railway company upon weight, the railway company gets practically no revenue for facilities afforded and the services in respect of the business which produces sixty per cent. of the gross revenues of the express company. They are enabled to do this business solely by virtue of the facilities and privileges afforded and the services rendered to them by the railway company. As they portray it, we furnish them with a movable banking house, and all the facilities for doing this to them a profitable, and to us a profitless, business. And this when the railway company is prepared to do and does this same sort of business for the public through its own agencies at no greater rates than the express companies charge. For this valuable privilege, derived by the express company from the railway company, the decree leaves the railway company without substantial compensation.

Take the C. O. D. business. This is of two classes; *first*, where the article is in charge of the Express Company's agent on the passenger train; and *second*, where the shipper sends the property to the destination by a freight train over a road selected by him, consigned to the Express Company's agent, and where the Express Company's agent on its delivery collects the amount of the bill and returns the money to the shipper. For business of the last class, the decree gives the Railway Company no compensation. Take as an illustration that given by Mr. Fargo (Iron Mt., 1014; M., K. & T., 146), of a car loaded with farm wagons, sent as freight to

dealers in the West by some manufacturers in the East. We will suppose the shipment is from Chicago to Little Rock. This carload may reach Little Rock by a road that is rival to the Iron Mountain, or it may go by water from Cairo. The Express Company's agent, who carries the bill of lading, travels on the Iron Mt. train from St. Louis to Little Rock; and arriving there, in advance of the consignment of goods, goes to the consignee and delivers the bill of lading and gets payment of the bill, and gives him a written order for the goods; and after receiving the money, the agent, as well as the money, itself is carried by the Iron Mt. Co. from Little Rock to St. Louis and under the decree, the Railway Company gets not a cent for the service of carrying the messenger or carrying the money. The same thing is true of the C. O. D. business, where the package accompanies the messenger in the passenger train, except in that case we get a fragmentary compensation in freight rates for the actual weight of the package transported.

MR. FARGO also says (Iron Mt., 1014; M., K. & T., 146), that one of the chief departments of the express business is the collecting of drafts, notes and accounts and protesting the same when required. This is a banking business. In fact, the great bulk of this kind of business is done through banks. Here again we transport notes, bills and accounts, as well as the messenger in charge of them, and transport back the moneys collected as well as the messenger in charge thereof. Under the decree, we must carry the messenger in charge thereof; and under the decree, we get nothing for it, or practically nothing. Are we bound to do this by some right divine of the express companies, and not obliged to do it at all or on the same terms for a national bank, a merchant or an attorney?

Messrs. Denning & Co., New York, successors of A. T. Stewart

& Co., advertise that they will deliver goods purchased of them free to any part of the United States. On the principle of this decree, what is there to prevent that house from putting up their parcels in a trunk or safe in charge of one of their traveling men, and demanding of the various railway companies that he shall be permitted to accompany the packages in some suitable car, that they shall make the requisite stops and afford the needed facilities for delivery, and receive pay therefor at the rate of fifty per cent. more than the ordinary rate of the Railway Company for freight for the actual weight carried, and bring him back again with or without any property accompanying him, as the case may be.

MR. FARGO (I. M. Record, p. 1017) undertakes to distinguish between the services rendered by express companies and those rendered by railway companies. Where the Railway Company has an express department, it renders every service rendered by express companies. In respect of the transportation of imported goods under the act of June 20, 1880, the same service is rendered by railway companies, which give bonds as therein required. The Iron Mountain Company has given such bonds.

MR. FARGO testifies in regard to the fast freight lines and the Merchants' Dispatch Transportation Company. He states that so far as he knows that company is the only one doing business on the commission plan, and that the others are based upon what is known as the co-operative plan. The co-operative plan is the same as where several railway companies do an express business in harmony, the purpose of which is to save the commissions which would be paid on the commission plan. Freight companies organized on any other plan than the co-operative system are leeches on the Railway Company. We are at a loss to know why this testimony in regard to the Merchants' Dispatch Company is produced unless it is to insist that railway companies are

bound to afford to that company, irrespective of any contract with it, an opportunity to get fifteen per cent. commission out of the railway companies, the railway companies standing all loss.

Rival and competitive relations between the Express Companies and the Railway Companies further shown. Rights and duties of common carriers. Railway and Express Companies are both common carriers. The decrees do not provide for a just and adequate compensation to the Railway Companies.

The Railway Companies and the Express Companies are both common carriers, and engaged in the carrying business.

It is well here to ascertain the rights and duties of common carriers, and to point out the manner in which the decree violates the common-law rights of the company.

The following is this Court's definition of a common carrier and its summary of his rights and duties, in the propeller "Niagara" vs. Cordes, 21 How., 7, 22.

"A COMMON CARRIER is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey. In all cases, where there is no special agreement to the contrary, *he is entitled to demand the price of carriage before he delivers the goods, and, if not paid, he may refuse to receive them;* but if he take charge of them for transportation, the non-payment of the price of carriage in advance will not discharge, affect or lessen his liability as a carrier in the case, and he may afterwards recover the price of the service performed. When he receives the goods it is his duty to take all possible care of them in their passage, make due transport, and safe and right delivery of them at the time agreed upon; or, in the absence of any stipulation in that behalf, within a

reasonable time. Common carriers are usually described as of two kinds, namely, carriers by land and carriers by water. At common law, a carrier by land is in the nature of an insurer, and is bound to keep and carry the goods intrusted to his care safely, and is liable for all losses, and in all events, unless he can prove that the loss happened from the act of God, or the public enemy, or by the act of the owner of the goods."

It has been repeatedly adjudged that an "AN EXPRESS COMPANY that forwards goods from place to place for hire, but in conveyances owned and managed by others," is a common carrier, and not a mere forwarder of goods.

Lawson, Contract of Carriers, Sec. I., and cases cited.

For reasons fully explained by this Court in its opinion in the Bank of Kentucky vs. The Adams Express Co., 93 U. S., 174, a party engaged as a common carrier cannot, by declaring or stipulating that he shall not be so considered, divest himself of the liability attached to the fixed legal character of the occupation, as, for example, in the case of an express company contracting not to "carry" but to "forward."

Lawson, Contracts of Carriers, Sec. 109, p. 130.

Accordingly, the author just cited, summarizing the cases, states the results thus (section 233):

"*It has been attempted on the part of express, forwarding and dispatch companies to evade the responsibilities of common carriers,* on the ground that they are not the owners of the vehicles employed in the transportation, but this pretense has not been permitted in the Courts. The names which they assume are regarded as immaterial, the duties which they undertake being the criterion of their liability. They are, therefore, held to the responsibility of common carriers, both where they are and where they are not interested in the conveyances by which the goods are transported. If an express company engaged to transport goods, sends them by a railroad company employed by it to perform the service, the railroad com-

pany becomes the agent of the express company, and the latter is liable to the consignor for its acts."

Citing, among other cases, Bank of Kentucky vs. Adams Express Co., 93 U. S., 174.

The powers and duties of common carriers are, in many respects *sui generis*. They spring from the nature of the common carrier's duty, the powers which he has over the goods entrusted to him, the opportunities this gives him for misconduct, and the unequal relation of the parties, and the necessity to protect the shipper. He is, in short, a public agent, *whose duties are prescribed by law*, incapable of being modified by any notice or *ex parte* act of the carrier, but capable, to a limited extent only, of being modified or limited by contract.

The public has a right to insist that the carrier shall receive and transport goods under the obligations which the common law has annexed to his employment. This doctrine is expressed by this Court in the New Jersey Steam Navigation Company vs. The Merchants' Bank, 6 How., 382, in the following language:

"He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public limiting his obligation, which or may not be assented to. He is bound to receive and carry all goods offered for transportation, *subject to the responsibilities incident to his employment*, and is liable to an action in case of refusal. And we agree with the Court in the case of Hollister vs. Nowlen (19 Wend., 234), that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of carrier, as it is that he assented to their qualification."

The same language is used by the Presiding Justice in the case of Hollister vs. Nowlen, 19 Wend., 234:

"One has a right to insist that the carrier shall receive goods *subject to all the responsibilities incident to his employment.* A carrier is under a legal obligation to receive and convey goods safely or answer for the loss. He has no right to prescribe other terms; and notice can, at most, only amount to a proposal for a special contract which requires the assent of the other party."

The settled doctrine of the law on this subject is thus stated by Lawson, Contract of Carriers, section 212:

"It has been seen that a common carrier is bound by law to bear the extraordinary risks attached to his calling, for all who may choose to employ him, upon the terms of paying him his reasonable compensation therefor. He cannot refuse to receive and transport goods offered to him because the shipper will not assent to their being carried under a special contract limiting his common law responsibility, and if he should do so, he would render himself liable to an action."

Lawson, section 212, and cases cited, among which is the case of the Southern Express Company vs. Moon, 39 Miss., 822, where it is said:

"Consignors have only to insist upon a simple receipt for their goods, offering to pay reasonable compensation, and steadily refusing the artfully prepared receipts limiting the carrier's liability and depriving the consignor of his legal rights, to restore in practice the security and safety which the law affords."

It is needless to go further than the judgment of this Court, given by Mr. Justice BRADLEY in Railroad Co. vs. Lockwood, 17 Wallace, 357. Mr. Justice BRADLEY there says:

"It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment, and to assert that he may do so seems almost a contra-

diction in terms (p. 378). * * * If all contracts between the public and carriers were held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect by introducing new rules of obligation. The carrier and his customer do not stand on a footing of equality" (p. 379).

The shipper has, therefore, a right to insist that the company shall receive and transport his goods subject to the unmodified common law liability of carrier, *and is not bound to enter into a contract with the carrier, however reasonable in its terms in respect of their carriage. On the other hand, the company has a reciprocal right to refuse to make any contract changing its common law duties and obligations, and the further right to perform these obligations and duties, and to receive a reasonable compensation based upon the cogency and extent of the duties required, and the nature and value of the service rendered, including the risks incurred.*

The owner has no legal right to demand of the carrier that he shall enter into a contract whereby the owner shall assume any part of the duties and risks incident to the carrier's employment, among which duties and risks of the carrier is that he is liable as an insurer of the property carried, which liability is always connected with *the custody of the goods.*

Collis vs. Lamb, 11 Pa. St., 515.

Not only is he entitled to the custody of the goods, but is entitled to a compensation based upon the nature and value of the services rendered and the risks assumed, including that of insurer.

Lord MANSFIELD, in Gibbon vs. Paynton, 4 Burr, 2298, says:

"His warranty and insurance is in respect to the reward which he is to receive; and the reward ought to be proportional to the risk."

Lawson, on Carriers, Section 86, says:

"The liability of a common carrier being founded on his reward, he is entitled to give notice that he will not be answerable for valuable goods unless he is informed of their value."

S. P. Per BRADLEY, in Railroad Co. vs. Lockwood, 17 Wallace, p. 380.

The law is well settled that a carrier may require the value to be stated and charge accordingly.

In Hart vs. Pennsylvania R. R., 112 U. S., 331, 340, the Court says:

"As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them. If the shipper is guilty of fraud or imposition by misrepresenting the nature or value of the articles, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed, and what he has done has tended to lessen the vigilance the carrier would otherwise have bestowed (cases cited)."

In the the case last cited, the contract signed by the shipper and fairly made, agreed upon a valuation of the property carried, with a rate of freight based on the condition that the carrier assumed liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, was upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations.

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In Railroad Company vs. Fraloff, 100 U. S., 24 (where a Russian countess recovered $10,000 for the loss of lace carried as baggage), Mr. Justice HARLAN says:

"It is undoubtedly competent for the carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability as insurers for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk. And in order that such regulations may be practically effective, and the carrier advised of the full extent of its responsibility, and consequently of the degree of precaution necessary upon its part, it may rightfully require as a condition precedent to any contract for the transportation of baggage, information from the passenger as to its value" (p. 24).

In Magnin vs. Dinsmore, 70 N. Y., 410, the judgment given by the Court of Appeals in favor of the Adams Express Company goes still further. The Court there held the following proposition:

"That where a carrier by his contract limits his liability to a specified amount in case the value of the goods delivered for carriage is not stated by the shipper, if goods of greater value are so delivered, *silence* on the part of the shipper as to the real value, although there is no inquiry by the carrier, and no artifice to conceal the value or to deceive is a legal fraud, which discharges the carrier from liability for ordinary negligence for an amount exceeding the limitation of the contract." "The disclosure of value in such case is a condition precedent to liability on the part of the carrier for mere ordinary negligence unaccompanied with any misfeasance or willful act. An omission upon the part of the carrier to make inquiry as to the value is not a waiver of the limitation in the contract."

IT FOLLOWS FROM THE FOREGOING that the decrees appealed from in the cases at the bar are erroneous, because they deprive the railway companies of the right to receive compensation based upon its common law duties which make the railway carrier not only liable

as an insurer, but also liable for the negligence of its own servants, for all of which risks it is entitled to be compensated.

As to the liability of the appellant Railway Companies for damage or loss of goods on its road, while in the actual custody of the Express Company *under the decrees*, see Mr. Justice MILLER'S opinion, I. M. Record, par. 3, p. 63.

The judgments of this Court establish that when there is a contract between the Express Company and the Railway Company, whereby the Express Company is left in the actual custody of the goods while being transported by the Railway Company, that the Railway Company is nevertheless a common carrier, and is the agent of the Express Company and of the general owner, and that the general owner may maintain a suit directly against the Railway Company for loss or damage to the goods caused by its negligence, and the Railway Company is thus liable, even if the Express Company had agreed with the Railway Company that the latter should not be responsible to the Express Company or its employers. It is also held by the Court that in such case the rights of the general owner are controlled by a valid contract (as to the risk) between the Express Company and the Railway Company.

The first and leading case on this subject is:

The New Jersey Steam Navigation Company vs. The Merchants' Bank of Boston, 6 How., 344. The facts were these:

Harnden, an expressman, was employed by the libellants to transport $18,000 in money belonging to them from New York to Boston, he "using the public conveyances between those cities as

the mode of transportation." "For this purpose he [Harnden] entered into a contract with the respondents [the Navigation Company], by which, in consideration of $250 per month, they agreed to allow him the privilege of transporting on their steamers between New York and Providence a wooden crate 5 feet by 5 (contents unknown), subject to the condition that the crate with its contents should at all times be exclusively at the risk of said Harnden, and the respondents not in any event to be responsible to him or his employers for the loss of any goods, money, &c., to be transported by him in said crate or otherwise in the boats of the company." The boat took fire in consequence of the negligence and want of care of its officers, and the money of the libellants was lost. The libellants sued the Steamboat Company, and not Harnden.

They recovered below and the Supreme Court affirmed the judgment. The propositions decided by the Supreme Court are thus stated by Judge CURTIS:

"The general owner of specie who has employed a person, commonly called an expressman, to transport it for him, may maintain a suit against the carriers, who are proprietors of a steamboat, for its loss through the fault of the steamboat proprietors or its agents, with whom such expressman had a contract to transport the effects in his charge.

"But in such a case the rights of the general owner are controlled by a valid contract between the expressman and the steamboat proprietors.

"A stipulation that the carriers are not to be responsible in any event for loss or damage, was not intended to exonerate them from liability for want of ordinary care."

NELSON, J., delivering the opinion of the Court, says:

"I. *As to the right of the libellants to maintain the suit* (p. 380).

"They had employed Harnden to collect checks and drafts on the banks in the City of New York, and to bring home the proceeds in specie. He had no interest in the money, or in the contract with

the respondents for its conveyance, except what was derived from the possession in the execution of his agency. The general property remained in the libellants, the real owners, subject at all times to their direction and control; and any loss that might happen to it in the course of the shipment would fall upon them.

"This would be clearly so if Harnden is to be regarded as a private agent; and even if in the light of a common carrier of this description of goods, the result would not be changed, so far as relates to the right of property.

"The carrier has a lien on the goods for his freight if not paid in advance; but subject to this claim he can set up no right of property or of possession against the general owners. Story on Bailments, Sec. 93, g.

"The carrier, says BULLER, J., is considered in law the agent or servant of the owner, and the possession of the agent is the possession of the owner. 4 T. R., 490.

"*Under these circumstances, the contract between Harnden and the respondents for the transportation of the specie was, in contemplation of law, a contract between them and the libellants; and although made in his name, and without disclosing his employer at the time, a suit may be maintained directly upon it in their names.*"

Under such circumstances the general owner may sue either the Express Company or the Railroad Company.

Bank of Ky. vs. Adams Express Co. 93 U. S., 174.

In the case last cited it is said (at p. 184), *arguendo*, STRONG, J.:

"The department in the car was the defendants' (the Adams Company) for the time being; and, if the defendants retained the custody of the packages carried, instead of trusting them to the company, the latter did not *insure* the carriage. Miles vs. Cattle, 6 Bing., 743; Towers vs. The Utica & Syracuse R. R. Co., 7 Hill (N. Y.), 47; Redf. on Railw., Sect. 74." * * *

"Granting that the plaintiffs can sue the Railroad Company for the loss of the packages through its fault, their right comes through their contract between it and the defendants. They must claim through that (6 How. 381). *Had the packages been delivered* [*by the Express Company*] *to the charge of the Railroad Company, without any stipulation of exemption from the ordinary liability of carriers,*

it would have been an insurer both to the Express Company and to the plaintiffs."

Bank of Kentucky vs. Adams Ex. Co., 93 U. S., 184.

It may deserve consideration whether as to the *general owner*, the Railway Company was not an insurer. But whether so or not, *as under the decree* all goods are delivered on board of the cars of the Railway Company, without any stipulation of exemption from the ordinary liability of carriers, it would be an *insurer* both to the Express Company and through it to the general owner.

Now, under the decree, if goods are lost or damaged while on the cars of the Railway Company, it is liable, perhaps, as an insurer, certainly for negligence, either to the Express Company or the general owner.

The contracts (Record, pp. 6, 8) provided that

"the Railroad Company shall be exempt and indemnified by said Express Company against all loss or damage to goods or money transported by said Express Company."

The decree give the railway companies no such protection.

Packed Parcels Controversy.

The record shows that, prior to the final decree, the Railway Company insisted, not upon the right to inspect and open packages, but upon the Express Company's giving a true description as to weight and value of each consignment which they required the Railway Company to carry. This was required by the Railway Company to enable it to determine what would a fair charge for the transportation of such package. The Express Company denied the right of the Railway Company to make this requirement, and also sought to evade the requirement by packing smaller parcels in chests, safes and boxes, and refused to give to the Railway Com-

pany a description of their weight and value, and insisted upon paying for them by weight at the rate per hundred pounds, thereby decreasing the Railway Company's revenues, as shown by the evidence, very largely from what it would have received had it transported these same packages on account of the owners thereof.

By the tariffs of the Southern Express Company, and of other express companies, and of the Iron Mountain Company, the charge for the transportation of consignments of a less weight than one hundred pounds is very much higher per pound than when the shipment weighs a hundred pounds or more, and particularly so on small packages, the minimum price for one pound being twenty-five cents. Whereas, at the rate for one hundred pounds it would be but two or three cents per pound. Suppose the Express Company at St. Louis has one hundred packages weighing one pound or less each, consigned to different persons at Little Rock, the Express Company would charge the public twenty-five cents for each package, and then put them into a chest or safe marked Little Rock, refuse to give the Railway Company any knowledge of the number or character of the packages, and insist upon paying therefor at the established rate per hundred pounds, and give the Railway Company two dollars where they receive twenty-five, and compel the Railway Company to forego the profit derived from the transportation and handling of small packages—a service which they are authorized and fully prepared to render for the same price that the Express Company charged the public. In the case of MONEY PACKAGES, where the basis of the charge is the amount carried, and not the weight, while the Express Company gets large revenues for the transportation, of which the Railway Company, under the orders and the decree which adopt the tonnage basis of compensation, gets substantially nothing.

We do not claim the right to open and inspect packages which have been sealed or closed by the consignors.

But we do strenuously claim that we are entitled to be informed of their number and nature.

We also claim that we may make a charge for carrying based upon such value.

We also claim that we are entitled to be paid parcel rates and not simply tonnage rates, if we carry for the Express Company when they charge parcel rates to the public and we likewise charge to the public parcel rates.

These claims seem to be so reasonable that their statement ought to be sufficient for their support.

The counsel for the express companies deny the soundness or justice of these claims, and call to their aid certain decisions upon English statutes hereafter referred to, and which will be shown hereafter (when the statutes and circumstances are considered) to have no bearing, or, if any, a bearing favorable to the appellant railway companies.

The distinction between tonnage rate and parcel rates, the first based upon weight and the last upon number, is recognized by the English legislation, and the English decisions hold that the railway companies cannot be compelled to carry parcels at tonnage rates.

Appellant's Brief, p. 43; Hodges on Railways (6th Ed.), 473.

Accessorial Services.

The express companies insist that in determining the amount of compensation they should pay the railway companies that an allowance be made to them for what they style accessorial services. This

claim is not noticed in the Opinion or Decree. The word is new to the express companies.

JULIER (Asst. Sup. Adams Co.), I. M. R., p. 563, Ans. 22.

In its wonderful expansion it has been made to include not only the wagon service, for which there is some plausibility, but also the cost or rent of offices, the expense of fitting, heating and lighting them, the cost of the books and way-bills and other stationery used in the offices and at other places in its business; the salaries of officers, including superintendents and assistant and division superintendents; the wages of clerks in the offices, of messengers, route and station agents, and laborers; the value of the trunks, boxes, bags and safes used for packing freights for transportation, attorney's fees and court costs, insurance on property in the offices of the company, and upon goods in transit, and, in short, as stated by this witness:

"All the outlays, expenses and services of whatsever nature, opposite to those performed by the railroad companies in the express business" (Julier, p. 565, Cr.-Q. 30).

"Every conceivable item, except simply that of railroad transportation" (Julier, p. 565, Cr.-Q. 37).

If the claim to have all its expenses paid, directly or indirectly, by defendant, can be sustained, that complainant's business has in it no element of risk—that it *is all profit;* and it seems just as evident that the part of the business assigned to the defendant *is the loss.*

Mr. Julier (page 540) undertakes to state what is a "reasonable and proper compensation" to the Express Companies for "accessorial services," and to railroads for transportation. This he distributes: Fifty per cent. as compensation to the Express Company

for accessorial services; *not exceeding forty* to the railroad for transportation; and the remaining ten per cent. "would be for loss and damage, and profit." This "profit" is, of course, to the Express Companies.

Wagon Service.

There is one part of this "accessorial" service as to which, at first view, the claim of complainant appears more tenable. This is the wagon service—that part performed by wagons in cities in gathering up and delivering freights.

This service is only performed at the larger towns and cities, at only 7 out of the 140 stations on the Iron Mountain road, and 2 out of 20 stations on the Memphis and Little Rock road.

Why should the Railway Companies, under the circumstances of these cases, pay to the Express Companies the expense of this wagon service?

It is apparent that this can only benefit the defendant by increasing the total amount of its business, or by bringing to it business which it would not otherwise receive. *It is not shown that defendant is thus benefited by complainant.* On the contrary, from the concession in the record that the whole volume of business is not more than one messenger can handle, it may well be inferred: 1. That defendant, which must keep its own office and wagons in each of the cities in which this service is done, can, without additional expense, do the whole business itself. 2. That the business is too small for profitable division; and 3. *That instead of being benefited, defendant is actually injured by complainant's interference.*

No charge is made by the Express Company for such service. The Express Company charges the same for the transportation of a package when it is brought to or received at its office, as it does

when it collects the same from some one and delivers the same to the consignee at his residence or place of business.

The object of running wagons for the collection and delivery of express matter is solely to increase its business. This increases it in two ways: *First*, its wagons are an effective advertisement; *second*, it is a means of getting business which might otherwise go by other companies.

See Agee and Morseman's evidence.

Express Companies establish this service as a means of securing business. *None of them make any separate charge for it.* They set up and keep their wagon just as a merchant in a city sets up and keeps his delivery wagon, and for the same purpose. He makes no additional charge for delivering goods purchased, but relies upon increased sales and consequent increased aggregate profits for his compensation. In the express business the same thing is done, for the same purpose, and with the same reliance. That this is true is proven by the fact that wagons are only used in the larger towns and cities.

A controlling reason why this rebate for wagon service should not be compelled is that neither complainant nor defendant make any charge for it. *No deduction is made by complainant from its charges to its customers, when this service is not rendered.*

If a shipper brings his package to the office or depot, and the consignee calls for and receives it there, no accessorial service being performed, no deduction is made by complainant from its regular charges.

See testimony Albright, complainant's testimony, Iron Mountain Case, p. 272, Cr.-Q., 203, 208.

The Railway Companies insist that for these reasons the Express Company cannot reasonably claim rates less than are charged by

the Railroad Companies to others; and for the further reason that the Railway Company is engaged in the same kind of business itself and is prepared to render the same kind of service.

Some indirect suggestions are made in the briefs of the counsel for the Express Companies that the Railway Companies are not authorized to run wagons to collect and deliver packages or goods —that it is limited to making contracts for services on its railway from station to station—to a station rate from the initial to the terminal station.

This Court has declared the law to be otherwise.

A railroad company "possessing the powers given to such corporations generally," has "the power to contract as a common carrier for the transportation of property beyond its terminus."

Railroad Company vs. Pratt, 22 Wall., 123.

In this case a New York railway company contracted to deliver horses in Boston, and was held liable for the negligence of the Vermont Central Railway Company (a connecting line), whereby the horses were burned to death on the road of the last named company, a Vermont corporation.

"The fair result of the American cases," says the Court (22 Wall. *supra*, p. 129), "limits the carrier's liability as such, when no special contract is made, to his own line, although there are cases which hold the liability as continuing the same throughout the whole route, and such is the English doctrine." Per HUNT, J., p. 129.

ENGLISH DECISIONS.

The Equality clause; namely, 90th section of the Railway Clauses Act of 8 Vict., Chap. 20, 1854, known as Lord Shaftsbury's Clause.

Unreasonable preference clause of the Railway and Canal Traffic Act of 1854, 17 and 18 Vict., Chap. 31, Sec. 2.

The Act of 1845 above is printed in Hodges' Law of Railways, sixth edition, page 790 *et seq.*, and is entitled "*An Act for the consolidation in one act of certain provisions usually inserted in acts authorizing the making of railways.*"

Section 90, known as the equality clause, is reprinted, Hodges, page 807.

The Railway and Canal Traffic Act of 1854 is printed at large, Hodges, page 845 *et seq.*

The history of this act is set forth by the author, page 474.

"The third section authorizes 'any person complaining of an act or omission in violation of the Act to apply in a summary way by motion or summons to the Court of Common Pleas or any Judge of such Court.' This section also provides that 'if it be made to appear to such Court or Judge on such hearing that anything has been done or omission made in violation of the act, it shall be lawful for such Court or Judge to issue a writ of injunction or interdict restraining such company from continuing such violation of the act and enjoining obedience to the same.'"

Under these two acts, numerous decisions by the English Courts have been cited by the counsel for Express Companies as well as in the appellant's brief, relating to "*terminal charges*," so called in England, meaning cartage charges, and to the compensation of railways for carrying "*packed parcels*" so called.

Mr. Hodges (Railways, 6th Ed.), page 475, note, says that the Act of 1854 "proved almost a dead letter in many important respects for nearly twenty years," for which he gives the reasons (page 437), stating that "it had been administered by the Court of Common Pleas with indifferent success," * * * "a court of law not being sufficiently informed in respect of railway management."

Accordingly Parliament in the year 1873, as the result of the appointment of a joint select committee of the two houses and an inquiry into and report upon the general subject, passed the "Regulation of Railways Act of 1873" (text, Hodges, page 954).

The Report recommended and the Act provided for the appointment of "a Railway and Canal Commission," to consist of not less than three persons of high standing, one of whom shall be an eminent lawyer and one a person well acquainted with railway management (Hodges, p. 438). All the powers of the Court of Common Pleas and of the Judges thereof conferred by the Railway and Canal Traffic Act of 1854 as well as the Regulation of Railways Act of 1864, were taken away from the Court and Judges and transferred to the Commissioners. The Act of 1873 is still in operation.

Packed Parcels.

The special acts of Parliament incorporating railways prior to the Railway Clauses Act of 1845 had contained special clauses authorizing special and increased charges for small packages and single articles of great weight. An example, see Hodges, page 466; another example, Hodges, page 472.

The Equality Clause of the Act of 1845, section 90, is as follows:

"Whereas it is *expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic*, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, *for the company*, subject to the provisions and limitations herein and in the special act contained, from time to time to *alter or vary the tolls* by the special act authorized to be

taken, either upon the whole or upon any particular portions of the railway, *as they shall think fit;* Provided that all such tolls be at all times charged *equally to all persons* and after the same rate, whether per ton per mile or otherwise, in respect of all passengers and of *all goods* or carriages *of the same description*, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway *under the same circumstances;* and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the railway."

The "Undue Preference Clause" of 17 and 18 Vict., Chap. 31, section 2 (A. D. 1854), is as follows:

"Every railway company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways belonging to or worked by such companies respectively; and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

THE MODE OF DOING BUSINESS IN ENGLAND clearly appears to be very different in many details from the mode of doing business in this country. Railway Companies there are in the habit of establishing offices in large cities distant from their stations and there receiving goods of all classes, large and small, and also of collecting goods for railway transportation at the manufactories, stores, &c., of the consignors, and to cart the same with their own wagons to the station, for which they make a specific cartage charge.

There are also common carriers known as "intercepting carriers," of whom Baxendale and partners doing business under the firm name of Pickford & Co. and Sutton & Co. are examples,

whose business it is to receive consignments of goods to be by them delivered to the consignees in other places reached by railway, and to employ the Railway Company to which delivery is made to convey them in its own custody from station to station; that is, they bring the goods to the initial railway station and take them away from the terminal railway station and deliver them to the consignees, for which they make a charge embracing the charges of the Railway Company, together with their own charges for the collection and delivery. It will thus be seen that the Railway Companies and such intercepting carriers are rivals *in the cartage business, but no further.*

The Court will also notice that the intercepting carriers make no claim to remain in the custody of the goods while they are in transit on the railway, nor do they make any claim to have any reduction from the rates charged by the Railway Company to other persons.

It is unnecessary to go over the numerous English decisions. They are all based upon the clauses above referred to.

Two leading cases will stand as types of all.

In Baxendale vs. G. W. Ry., 5 C. B. N. S., 336 (Reading Case, Judge CAMPBELL'S brief, pages 25 to 27), it appeared that the complainants Baxendale and others, carrying on business under the firm name of Pickford & Company were common carriers, engaged in the business of carting and delivering goods, employing the railroad to transport them between Reading and Padington, London. The Railway Company, "in addition to its business as carriers on the line were carriers to and from the termini of the railroad," that is they were in the cartage business rivals with Pickford & Company. Down to a late period, the Railway Company charged a uniform rate of 3s. 6d. per ton on all goods carried on the railroad between their stations of Reading and Paddington (station to station rate) and the goods were collected and delivered both by the Railway

Company and Pickford & Company at a charge of 4s. 10d. per ton, this representing the cartage charge. The Railway Company then raised the charge for carrying goods to 8s. 4d., being the aggregate of the former charge both from station to station, and the cartage charge, and notified the public that the Railway Company would collect and deliver goods free of charge. The purpose of this arrangement being to compel persons desiring to have their goods conveyed by the railway, to employ the Railway Company to collect and deliver such goods, and thus secure itself the business and the profit upon it, as well as to exclude Pickford & Company from competing with the Railway Company in this department of business.

COCKBURN, C. J., refers to the statutory jurisdiction of the Court, and to the distinction between cases in which the interest of the company as a railway is sought to be promoted and its interests distinct from those of the railway itself (the case in hand being of the latter class), and adverted to the greater difficulty and nicety in dealing with cases in which the thing complained of is a benefit to the company in their character as the proprietors of a particular railway; and holds that the course of action of the Railway Company above described was a violation of the undue preference, clause, 17 and 18 Vict., Chap. 31, Sect. 2.

The facts, in the case of Palmer vs. London, &c., Railway, L. R., 6 C. P., 194, sufficiently appear in the headnote, which is as follows:

"A Railway Company, with the view of competing with other carriers in the collection and carriage of goods, established a receiving office in various parts of London, from which goods were brought in vans to the railroad station. The gates of the station were closed against the vans of complainant and other carriers at six-thirty P. M.; but the Railway Company's own vans were admitted at a much later hour, and the goods brought by them were forwarded by the same trains; held, that this was giving an undue and unreasonable preference to the company's own traffic to the prejudice of complainant."

Hodges, pp. 477–480, gives, in a Table of decisions under the Traffic Act, 1854, a succinct statement of the points decided, and at p. 504, a table of the decisions of the Railway Commissioners since 1873.

The effect of the numerous decisions is correctly stated by Mr. Hodges on pages 471 and 472. He says with the exception of two cases not material, "it will be found that the plaintiffs were [intercepting] carriers; that the litigation arose from one of two causes. They (the Railway Companies) had either charged the carriers additional rates for 'packed parcels,' that is, parcels made up of several parcels in one envelope, or had charged the carriers for the collection and delivery or other terminal service which the carriers had performed themselves; the object of the Railway Company uniformly being to take the collection and delivery trade out of the hands of the carriers, and the object of the carriers being to retain it. It may now be taken to be settled by the decision of the House of Lords (*G. W. R. Co. vs. Sutton*, L. R., 4 H. L., 226) that extra charges *to carriers* in respect to packed parcels are overcharges, and that they may be recovered back by action. In such an action it is not necessary for the plaintiff to show that he tendered the sum legally due for such carriage, and (as to packed parcels) it is enough for the plaintiff to show that the company are in the habit of carrying packed parcels for other persons at lower rates than those charged to the plaintiff without showing affirmatively that the company knew them to be packed. * * * * * * So that the company have no right to make distinctions between carriers and the rest of the public. These cases (referred to in the note) chiefly turn on special acts; but it is to be observed that the equality clauses in the special acts differed little, if at all, from the 90th section of the Railway Clauses Act. * * * It would seem that a clause of this kind and the equality clause, taken together, do not so much prevent the companies from charging a higher rate to all the world for packed parcels, as they prevent the companies charging a higher rate to carriers than to the rest of the world."

All of the English Acts (examples Hodges pp. 466, 472) allow increased rates for small parcels, called a parcel rate. There is no

decision that such rates may not be charged, and they are universally charged. The decisions being only that the company cannot, under the clauses referred to, charge a rival carrier any more than they charge the public at large.

"Terminal Charges."

Under the "Equality Clause" of the Act of 1845, and the "Undue Preference Clause" of the Act of 1854, the result of the decisions is thus stated by Mr. Hodges, page 473:

"It is clearly settled that where carriers [that is, intercepting carriers] receive their own goods at a terminus, the companies are not entitled to charge the carriers the same sum as they charge to other persons whose goods are delivered by the company at the final place of destination, and that carriers doing collection and delivery themselves may recover rebates from the companies."

Bills Should be Dismissed on the Merits.

The railway companies insist, as the bills are based upon the *supposed legal duty* on their part to grant the express companies the facilities and render them the services they demand, that as, such legal duty does not exist, the bills should be dismissed without any further inquiry.

No Jurisdiction in Equity.

But if such legal duty does exist, the railway companies insist that a *Court of Equity* has no jurisdiction to enforce the performance of such duty.

If a common carrier refuses to receive goods, an action lies for damages. So if he charges an unreasonable rate. Each case is specific, and can be examined and determined by a jury upon its own facts and circumstances.

But by these bills relief for the future (not the past) is asked Not for a specific term, but indefinitely. Not for a specific act or acts, but in respect of a *continuing* and *complicated business* relation which necessarily changes from day to day.

No CONTRACT exists which the Court is asked specifically to enforce.

References by learned counsel to the doctrines of equity in respect to the specific performance of *contracts*, have obviously no application, because here no contract exists.

Specific execution of common law or statutory duties would indeed be a new head of equity.

No STATUTE has declared the existence of the duties here sought to be enforced.

The duties decreed are inconsistent with some of the most important common law rights of common carriers, and imply their abrogation.

No statute has granted jurisdiction of the matters complained of to Courts of Equity. On the contrary, the statutes of the States in which the appellant companies exist, contemplate *actions at law* for a violation of duty by a railway company.

Under the circumstances, the appellants insist that the Court of Chancery has no jurisdiction of the case stated in the bill, or to fix and establish rates or determine the compensation to the defendants.

It falls within no recognized head of equity, neither accident, fraud, trust, specific performance or other ground of the jurisdiction of Chancery.

2. A court of equity cannot grant the relief asked, viz., determine the business relations between the parties—what facilities are required and what they are worth. Any compensation must necessa[illegible]ay

rily be fluctuating, dependent on the increased or diminished cost of transportation, and if it is to be fixed in reference to the charges of other or competing roads, and not upon the cost, operating expenses and a reasonable profit to the road employed, constant and renewed applications to the Court must be the result. In fact, the Court will be constantly employed in determining the effect of altered conditions of fact.

Such inquiries are not suitable for Courts to make, and no court of equity will or ought to exercise such a jurisdiction unless it is by virtue of a statute conferring it.

Topeka, &c., R. R. Co. vs. Denver, &c., R. R. Co., 110 U. S., 675.

Mr. Hodges, in his work on Railways (6th Ed., p. 473), says: "The Court of Exchequer refused (in Baxendale vs. Ry. Co., L. R., 1 Ex., 137) to grant an injunction under the Common Law Procedure Act of 1854, to restrain a company from charging a carrier otherwise than in conformity with the equality clause. It is doubtful whether any division of the High Court has jurisdiction to issue such an injunction, and it is hard to conceive a case in which it would be convenient to do so. The proper tribunal to apply to would seem the Railway Commissioners, who may exercise all the special jurisdiction originally vested in the Court of Common Pleas by the Railway and Canal Traffic Act, 1854."

The jurisdiction of the English courts over such subjects has always been given by statute.

3. Courts of equity have constantly refused to grant relief even to enforce rights growing out of contract or *rights expressly given by statute*, the doing of which requires continuous attention from the Court.

Gervais vs. Edwards, 2 Drury & Warren, 80.
Hill vs. Croll, 2 Phil., 60.
Blackett vs. Bates, L. R., 1 Chan. App., p. 117.

The case Powell Duffryn Steam Coal Co. vs. Taff Vale Ry. Co., Law Reports, 9 Chancery Appeals 331, A. D. 1874, is so pertinent an application of this doctrine to a case similar to those at bar, that for convenience it is stated at length. The head-note is as follows:

"A railway company having refused to allow the plaintiffs to run engines and carriages over part of their line under the powers of the 'Railway Clauses' Act, 1845, s. 92, the plaintiffs filed their bill for an injunction to restrain the company from preventing their exercise of the right:

HELD (affirming the decision of Hall, V. C), that, inasmuch as the plaintiffs could not run over the line unless the points and signals on the line were properly worked by the railroad company, this Court could not grant relief, as it does not order the performance of a continuous act like working signals, the doing of which requires continuous attention, and cannot be seen to by the Court.

THE LORD JUSTICE JAMES, interrupting counsel, said: "I doubt whether this Court can give effect to the rights conferred by section 92. As far as my experience goes, the Court has never ordered anything which involves doing something from day to day for an indefinite period" (p. 334).

THE LORD JUSTICE MELLISH: I feel the same doubt, and am disposed to think that a Court of Common Law would feel the same difficulty as to a mandamus. A Court can only order the doing something which has to be done once for all, so that the Court can see to its being done. The Railway Clauses Act was passed at a time when the working of railways was not well understood. The Legislature seems to have considered that there was no more difficulty about running over a railway than along a turnpike road. It is found now that the use of points and signals is required; but how can the Court see to the defendants working them day after day for a series of years?

Counsel: "The defendants would only have to go on working the points and signals as they do. The necessary use of them is included in the use of the line:

Midland Railway Company vs. Ambergate Railway Company (3);

and the by-laws provide for the management of the line.

(Sections 76, 108, 115, were also referred to.)

THE LORD JUSTICE MELLISH: I do not see anything in the act that authorizes you to get the benefit of the services of the defendants' servants.

The opinion was as follows:

SIR W. M. JAMES, L. J.: I am of opinion in this case that the judment of the Vice-Chancellor cannot be disturbed. True it is that under the 76th and 92d sections of the Railway Clauses Consolidation Act, the plaintiffs appear to have the right given to them of using this railway with their engines, but, as pointed out by Vice-Chancellor Wickens, and afterwards by Vice-Chancellor Hall, it is impossible for them to exercise that right without danger, unless there is a continuous use of the signals and of the points by the defendants' own people. Now, it is, I think, impossibe to say that a company ought to be compelled by this Court to trust its points and signals, upon which so much of the safety of mankind now depends, to any other persons than its own pointsmen and its own signalmen. If, therefore, relief is given to the plaintiffs, it must in substance involve ordering the defendants to work the points and signals. But it is not the practice of this Court to compel by injunction either a company or an individual to do a continuous act which requires the continuous employment of people. The Court will, in a proper case, restrain a man from singing at one theatre; but it will not undertake to compel him to sing at another; it may restrain him from writing a book for one publisher, but it cannot compel him to write a book for another. Where what is required is not merely to restrain a party from doing an act of wrong, but to oblige him to do some continuous act involving labor and care, the Court has never found its way to do this by injunction. Both the learned Vice-Chancellors say that in all their experience they have never known such an injunction granted. My experience is the same. I think, therefore, that the order dimissing the bill must remain affirmed. At the same time it is to be observed that the plaintiffs come here to enforce a right which the Act of Parliament gives them, and which the Legislature intended them to have, and that they do not fail on the merits, the question as to the approval of the engines being a mere thing thrown in, and the real question between the parties having throughout been whether the plaintiffs have a right to use the railway at all. The plaintiffs fail only because of the difficulty in the way of this

Court's enforcing such a right—a difficulty which, to my mind, is insuperable. As their case, then, fails, not on the merits, but on the ground of the difficulty in giving them a remedy, I think that the bill should be dismissed without costs.

SIR G. MELLISH, L. J.: I am of the same opinion."

The Decree, and Observations thereon.

Paragraph I. of Decree.

"That the express business, as fully described and shown in the record, is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized so as to require the Court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads."

This is based upon the Opinion (Par. I), which in turn is based upon the mistaken notion that the express business is confined to the transportation of "*small and valuable packages*" only, and that there is an ascertained and ascertainable line of demarkation between express matter and "the large mass of freight usually carried on steamboats and railroads."

It is a mistake, as we have shown, to suppose that express matter is confined to small and valuable packages. It includes, in practice, anything and everything for which the shipper is willing to pay the increased cost of passenger-train transportation, from money, notes, drafts and other imponderable matter, to "live stock of all descriptions" (LOVEJOY, 1047), "25 cars, amounting to as much 250 tons of oysters per night" (*Ib.*, p. 1047), "ten cars per night of peaches" (*Ib.*, p. 1047), &c., &c., all of which is indifferently carried, either as common freight *or* as express matter (*Ib.*, pp. 1047, 1048).

So far as *dispatch* is an element, it is furnished by the railway company. It is idle to claim that there is any personal supervision of a peculiar character, or which the Railway Company cannot extend, over car loads of fruit, oysters, meat or any other property.

The best answer to the mistaken supposition that express matter is confined to small packages or forms any distinct class of property, is to go to the depot of any considerable city or town and see the arrival of "express cars" containing tons of merchandise of every description.

Par. II. of Decree.

"II. That it has become the law and usage, and is one of the necessities of the express business, that the property confided to an express company for transportation should be kept while in transit in the immediate charge of the messenger or agent of such express company."

Par. III. of Decree.

"III. That to refuse permission to such messengers or agents to accompany such property on the steamboats or railroads on which it has to be carried, and to deny them the right to custody of the property while so carried, would be destructive of the express business and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents."

Paragraphs II. and III. of the Decree are based upon paragraphs 2 and 5 of Mr. Justice MILLER's Opinion, which are as follows:

"2. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it, and to refuse permission to this agent to accompany these packages on steamboats or railroads on which they are carried, and

to deny them the right to the control of them while so carried, is destructive of the business and of the rights which the public have to the use of the railroads in this class of transportation."

"5. I am of the opinion that it is the duty of every railroad company to provide such conveyance by special cars, or otherwise, attached to their freight and passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the press business."

The underlying proposition here is that by "law and usage it has become one of the necessities of business," that railway companies should provide, so far as they reasonably can, for passenger-train transportation of property in the immediate charge of a messenger or attendant; the purpose being the accommodation, equally and alike, of every person, firm or corporation constituting the public, and not any particular person, firm or transportation company.

This duty, if it exists, is one which rests upon the Railway Company because it is a common carrier.

Suppose a railway company recognizes this duty and undertakes its performance, provides the facilities for doing it, goes to the expense of building up and fostering this business, is it bound to allow any every express company the right to carry on, in the manner claimed, a rival and interfering business on its lines? It cannot compel any express company to come on to its road. If it comes on, it may leave it at pleasure.

May the Railway Company not inquire and ascertain whether its coming on would not, by reason of its relations and contracts with competitive roads, be a positive injury to the Railway Company?

The express companies will not go on to new and small roads.

Suppose two express companies offer to come on to a railway, one of which is interested to bring it business and interested in no rival route, and the other, of which is interested in rival routes, must the railway company admit both, and, if so, on equal terms?

The answer must be found by ascertaining the basis of the supposed duty of the Railway Company. What is the duty of the Railway Company? Only the duty of a common carrier. What is the duty of a common carrier?

To receive, hold transport and deliver on payment of reasonable charges the property confided to its custody.

"Persons holding themselves out to the world as common carriers are bound to act as such in respect of such goods as they profess to carry, and have accommodation to carry, on such goods being tendered to them to be carried, and on a reasonable tender of proper compensation, without subjecting the person tendering them to any unreasonable condition." Per COCKBURN, C. J.

Garton vs. Bristol and Exeter Railway Co.; I B. & S., 162. (*Ante*, p.).

As the carrier is responsible for the safe delivery, he is entitled to the control and custody of the property in transit.

There is no common law obligation on a carrier, and no statute obligation on the appellant companies, to permit the shipper to do business *en route*. The Railway Company may permit such business to be done, but is not bound to permit it. There is no duty, common law or statuable, resting on the appellant companies but that of safe transportation and delivery at the place of consignment—any other duty, including the duty to extend facilities to a shipper to do business *en route* must arise out of either an express contract, or an express statute; and there is in the cases under argument no such contract and no such statute.

The Opinion says the use of express "facilities must be

extended to all who are actually and usually engaged in the express business."

The railway companies deny that those engaged in the express business have any right to demand of a railway carrier any duty which is not equally demandable by any other shipper.

The Constitutions of Missouri and Arkansas forbid "discrimination either in charges or *facilities* between transportation companies and individuals."

This is repeated in the legislation of Missouri and Kansas.

So far as the Opinion and Decree declare a duty to allow the express matter to be in the immediate charge of a custodian or messenger, the Railway Company performs that duty.

The common law is wiser than this decree. It protects the public by holding the carrier to be an insurer and does not undertake to prescribe the means he shall take to insure such safety.

As the Railway Company is responsible as an insurer or on the principle of *respondeat superior* for the negligence of its own servants, for the goods in the custody of the express messenger, it follows that it is itself entitled to the custody of the goods, and the whole basis of the Opinion and of the Decree falls.

It is, therefore, a vital objection to the decree that it takes away from the Railway Company the power to control its business as a common carrier. The common law imposes upon the carrier great and stringent responsibilities. It makes it an insurer of the goods. It is liable on the principle of *respondeat superior* for the acts, negligence and conduct of its own servants, whom it selects, controls and can discharge at pleasure. But if any express company or person engaged in the express business can intrude its messengers into the Railway Company's cars, the Railway Company is liable for their neglect and thefts, and, if not to the employees of the Express Company, it is clearly so to passengers and the owners of goods

entrusted to the Railroad Company, who may be injured by the wrongful acts of the employees of the Express Company.

When a contract is made between the expressman and the Railway Company, these risks are compensated for by the agreed price, but when an expressman is forced on the train by judicial decree, the Railway Company must take the risk of their misconduct without any compensation.

Where the Express Company does not occupy the whole car and shares it with the Railway Company, it is obvious that the goods in the custody of the Railway Company are exposed to the negligence and wrongful acts of the express messenger of the Express Company.

Par. IV. and VIII. of Decree.

"IV. That the defendant, its officers, agents and servants have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's company, *or to demand a knowledge of the contents thereof*, nor to refuse transportation thereof, unless such inspection be granted *or such knowledge be afforded*."

"VIII. That the plaintiff keep and render monthly a true account of the services performed for it by the defendant, and to pay therefor at the rate hereinafter specified, on or before the 15th of each month after the date hereof for the business of the month preceding, and that the defendant has no right to require prepayment for said express facilities, or payment thereof at the end of every train, or in any other manner than as is hereinafter provided; and that plaintiff execute and deliver to the defendant a bond in the sum of one hundred and fifty thousand dollars ($150,000), conditioned well and faithfully to make such payments as herein provided, and with surety to be approved by the Judge of the Court."

Paragraph IV. of the decree denies to the Railway Company to demand a knowledge of the contents, value or weight of the matter offered for transportation.

Paragraph VIII. authorizes the Express Company to keep and render monthly a true account of the services performed for it by the Railway Company.

The obvious objection to this is that the Railway Company must depend wholly upon the correctness of the account rendered by the Express Company; and the Railway Company has no means of verifying the correctness of such account. If the Courts will leave the parties to make their own contracts, they will frame one upon better business principles than this.

Another vital objection to the decree is that the Express Company is not required to render an account of the *value* of the articles transported for it by the Railway Company; and paragraph IV. of the decree denies to the Railway Company the right to demand or acquire a knowledge of the value of such articles, thus disabling it from keeping an account. The Railway Company is thus deprived of its well-settled right to make a charge for transportation based upon the *value* of the articles transported and the value of the services rendered.

Justice MILLER'S Opinion (par. 10) contemplated that either party might keep an account, but the Decree (par. VIII.) confines the right to keep the account to the plaintiff; and even if it did not, the defendant, not being allowed to inspect the express matter or demand a knowledge thereof, has no means to keep an account of the amount of business done or to know the value of the goods and articles carried for the Express Company.

Another vital objection to this part of the decree is that it destroys the common law right of a common carrier to be paid in advance if he demands it for the transportation. It also destroys the common law right to the custody of the goods and to a lien on the goods carried for the price of the carriage. Whence comes the power of a Federal Court of Equity to do these things?

Par. V. of the Decree.

"V. That it is the duty of the defendant to carry the *express matter* of the plaintiff's company and the *messengers or agents* in charge thereof, *at a just and reasonable rate of compensation*, and that such rate of compensation is to be found and established *as a unit*, and is to include as well the transportation of such messengers or agents as of the express matter in their custody and under their control.

This paragraph declares the "duty of the Railway Company to carry the *express matter*" of the plaintiff's company, without defining what is express matter and what is not.

It is then decreed that the Railway Company is not entitled to make its ordinary charge for the transportation of the messenger as a person or passenger, but must make a *gross or unit* charge for the entire services rendered, which charge is fixed in paragraph XI. of the decree.

In all railway tariffs, in all countries, the charges for the transportation of persons is made wholly irrespective of charges or rates for the transportation of freight. The carrying of messengers is a distinct service, the compensation for which, three cents per mile, is prescribed by statute, and being thus easily ascertainable, why should it be confused and mingled with the charges for the transportation of property?

The opinion of Mr. Justice MILLER contains no authority for this paragraph of the decree.

Pars. VII. and XI.

VII. That it is the duty of the defendant to accord to the plaintiff all *express facilities*, and to the same extent and upon the same train that said defendant *accord to itself* or to any other company or corporation engaged in the conduct of an express business on the

defendant's lines, and to afford the same facilities to plaintiff on all its passenger trains."

"XI. That the defendant, its officers, agents, servants and employees, and all persons acting under their authority, be, and they hereby are, permanently and perpetually enjoined and restrained from interfering with or disturbing in any manner the enjoyment by the plaintiff of the facilities provided for in this decree, to be accorded to it by the said defendant upon its line of railway, or *such as have been heretofore accorded to it for the transaction of the business of the plaintiff* and of the express business of the public confided to its care, and from interfering with any of the express matter or messengers of the plaintiff, and from excluding or ejecting any of its express matter or messengers from the depots, trains, cars or lines of the said defendant as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff, and from refusing to receive and transport in like manner as the said defendant is now transporting, or as it may hereafter transport, *for itself* or for any other express company over its lines of railway, the express matter and messengers of said plaintiff, and from interfering with or disturbing the business of the said plaintiff in any manner whatsoever; the said *plaintiff paying* for the services performed by it for the defendant monthly, as herein prescribed, at a *rate not exceeding fifty per centum more than its prescribed rates for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account*, or for any other express or other corporation, or for private individuals; reserving to either party a right *at any time* hereafter to apply to this Court, according to the rules in equity proceedings, for a modification of this decree as to the measure of compensation herein described."

Par. VII. does not define what "express facilities" shall be accorded.

But Par. XI. refers to the express facilities which had been afforded to the plaintiff under the contract, and decrees that these shall be continued *in perpetuum* against the Railway Company; thus virtually making that contract, at the election of the Express Company, perpetual.

These "*facilities*" cannot be diminished by the Railway Company, although it may not grant as great facilities to any other company.

For example, under the contract a specified amount of car space was provided for at a specified price per day. The decree requires this space to be continued to be furnished.

By paragraph VII. of the decree if the defendant uses for itself, or contracts to give to any other express company more space or facilities, the decree enlarges the rights which the expired contract gave the plaintiff, and requires the Railway Company to extend to the plaintiff every right and facility which it uses itself or grants to other companies, without requiring the plaintiff to guaranty that it will use and pay for the same.

If it uses two cars for its own express business it must furnish, or be ready to furnish, a like number to the plaintiff, although the plaintiff may not occupy or need them.

In short, the decree establishes perfect equality between the plaintiff and the defendant, and gives to the plaintiff every right which it would have if it owned the railroad, but imposes no burdens upon and makes no requirements of the plaintiff.

Unjust and inadequate compensation provided for by the decree.

The primary function of passenger train is the transportation of passengers or persons.

The legislation of Congress requires the mails to be carried on passenger trains, and is a preferential service to the Government and the public.

A passenger train is composed of baggage, mail and passenger coaches, including sleepers.

If the motive power is sufficient to carry an additional car or

cars, without substantially retarding the speed of the train, the company may use this for the transportation of property. Of necessity the capacity for this latter service is limited.

The so-called "limited trains" carry nothing but passenger coaches and a baggage car.

This extra motive power, which limits the capacity, is a thing of great value, which the railroad company has to sell.

There is a demand for it and the company may get the most for it it can, if it does not make extortionate rates.

The Express Company demands, and the decree sustains the demand, that exclusive cars or car space on passenger trains, be set aside for its use. What does this imply?

An express car weighs 30,000 lbs. We haul it 2,200 miles per day.

(Morley's Ev., I. M. R., p. 786). It is dead weight.

This *exclusive space* is required by the Express Company for two purposes, to wit:

1st. To give it necessary office room for their agent or messenger to transact his business *en route*, including the receiving, handling, sorting and delivering of money, jewelry, laces, collections and other express matter.

2d. For the storage in transit of that class of business denominated goods, wares and merchandise.

WE THUS FURNISH the Express Company, in addition to transportation of the messenger and matter transported, with a *traveling office and portable banking house* by means whereof the Express Company derives sixty per cent. of its revenues, and for which, under the decree we get virtually no compensation whatever, because this class of property has no appreciable weight.

WE ALSO FURNISH in addition to transportation, space to enable

the Express Company to transact its merchandise business *en route* by receiving, handling, assorting and delivering goods, wares and merchandise at the various stations.

There must be adequate vacant space left to enable the messenger to do this work while the train is moving. Such loss of room does not occur in transportation on ordinary freight trains. Because of the limited capacity of passenger train freight service, because such service is much more expensive, to the Railway Company; because it involves the carrying of the messenger, and this loss of space, there is no propriety or justice in making, as the decree arbitrarily does, the rates for ordinary freight service on freight trains, the standard to measure the compensation to the Railway Company for the facilities extended and the services rendered by it to the Express Company on passenger trains.

Now, observe the injustice of the decree. We must furnish the car and haul the dead weight. *There is no reciprocal obligation* in the decree that the Express Company shall occupy the space, and if it does not, the decree gives the Railway Company no compensation.

Compensation Clause of the Decree: "Not exceeding fifty per cent. more than its prescribed rates for the transportation of ordinary freights," says the Decree.

What are "ordinary freights?" Coal, cotton, grain, lumber, salt, cattle, and merchandise of all kinds. The same property falls within various classes of freights with different tariffs, depending upon space occupied, weight, value, and distance transported.

The railway companies carry certain goods and property at less rates per 100 lbs. by the *carload* than they do when they carry the same articles in less than carload lots: such as sugar, grain, manufactured articles. Certain commodities are not taken in carload lots. Suppose the express company carries a cask of whiskey weighing fifty lbs. from St. Louis to Little Rock, what is it to pay, under the

decree, to the R. R. Company for the facilities accorded by the decree and for transporting it? The railroad companies would charge for the 50 lbs. of whiskey, 1st class freight rates on 100 lbs. By the decree, as we understand it, the Express Company must pay us 50 per cent. more than we would receive if we carried the same 50 lbs. of whiskey as freight on freight trains.

The Express Company, finding that we carry whiskey in *carload lots* at reduced rates per 100 lbs., ascertain what at such rates we would get for 50 lbs. actual weight, and add 50 per cent. to that as our compensation, which would give us very much less than 1st class freight rates for carrying a corresponding package on our freight trains. The Express Company may and does construe the words of the decree, "prescribed rates for the transportation of ordinary freights," to mean the lowest price charged by the railway company for the transportation of the same kind of property without regard to quantity.

Another illustration: First class freight rates between St. Louis and Little Rock are say, $1.00 per 100 lbs. The R. R. Co.'s will take a box, as ordinary freight on freight trains, weighing say 3 lbs., and will charge therefor (the lowest charge) 50 cents. The Express Company takes same package on passenger train, and under the decree insists that the compensation to the Railway Company is

one cent per pound	3 cents.
50 per cent. added	1½
	4½
Loss to Ry Co.	45½ cents.

Another illustration: The Express Company claims that its business is the receiving, transportation, and delivery of money, bank notes, deeds, valuable papers, jewels, silks, laces, and other articles of great value.

Supose the Express Company carries from St. Louis to Little Rock $100,000 in bank bills or jewels, or laces, how much under the decree is it to pay the railway company for its services, including all required facilities and transportation of the messenger?

Practically nothing, because there is no weight, *and the decree excludes compensation to the Railway Company based upon value, and also for carrying the messenger in charge.*

If the Railway Company carried this $100,000 for the shipper, it would get its regular passenger train charge for this service. Such a service does not fall within "ordinary freight," or "ordinary freight service," and yet the decree restricts the Railway Company to a compensation based upon ordinary freight service.

The Railway Company, if it did this service, would receive therefor $100 (one-tenth of one per cent.) or more, from the shipper. The decree compels the Railway Company to lose this, while the public gets no better or cheaper service.

The maximum and only standard under the decree is 50 per cent. more than ordinary freight rates, and is to be less if the Railway Company charges less when it transports like matter on its own account on its passenger trains.

The legislation of *Kansas* expressly allows "the Railway to contract with shippers for transporting freight by express or passenger trains at such rates as the parties may agree upon."

Compiled Laws of Kansas, 1879, Sec. 59.

The legislation of *Missouri* fixes a maximum for passenger transportation (Rev. Stats. Mo., 1879, p. 146, Sec. 832), and classifies freights to be carried on freight trains, and regulates the charges therefor (*Ib.*, Secs. 833, 834).

Similar legislation exists in *Arkansas.*

Statutes Ark., Secs. 4994–4998. *Ib.*, Sec. 4993, Par. 10.

This legislation proceeds upon the theory that freight train rates have no application to transporting goods or traffic by express or passenger trains, and is inconsistent with the decree, which is based upon the prescribed rates for freight train service, which rates are based upon or must be kept within the statutory maximum.

Mr. Justice MILLER's Opinion (par. 10) contemplated the same mode of compensation as theretofore existing under the contract, which was a *per diem* contract, based upon space allotted, and it was a guaranteed and specific payment for each day's service.

The Decree (par. XI.) requires the express car to be transported and the "express facilities" to be furnished, and makes the amount of payment dependent upon tonnage—which gives no compensation for the messengers carried, and none, or next to none, for a large per cent. of the business done by the Express Companies by means of the services and facilities rendered and furnished by the Railway Company, and which is unjust, because it overlooks the cardinal element in the problem, viz., that the compensation should be measured not only by the cost of the service and the risks assumed, but also by the value of the service to the party receiving it.

FILED
NOV 3 1885
JAMES H. McKENNEY,
CLERK

MISSOURI, KANSAS & TEXAS R.R., APPELLANT,

v.

ADAMS EXPRESS Co.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R.R. Co., APPELLANT,

v.

SOUTHERN EXPRESS Co.

MEMPHIS & LITTLE ROCK R.R. Co., APPELLANT,

v.

SOUTHERN EXPRESS Co.

Memorandum by Appellants of Constitutional Provisions and Legislative Acts in MISSOURI, KANSAS, and ARKANSAS.

MISSOURI.

Constitutional Provisions of Missouri.

Article XIII, Sec. 14: adopted 1875.

Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers. The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of

freight and passenger tariffs on the different railroads in this State; and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and to enforce all such laws by adequate penalties.

SEC. 23. No discrimination in charges or facilities in transportation shall be made between transportation companies and individuals or in favor of either, by abatement, drawback or otherwise; and no railroad company or any lessee, manager or employee thereof shall make any preference in furnishing cars or motive power.

Statutory Provisions of Missouri.

WAGNER'S MO. STATS., 1872, p. 308, SEC. 31, (which section is a reprint of Sec. 31 of the General Statutes of Missouri of 1865, Chap. 63, p. 341.)

This section provides *inter alia*, that railroad companies "shall be entitled to charge not less than fifty cents for each single package or lot of freight," also, "that nothing in this section shall prevent railroad companies from contracting with shippers for transporting freight by express, or passenger trains at such rates as the parties may agree upon." (1 Wagner Stats. Mo., 1872, pp. 308, 309.)

ACT OF MARCH 29, 1875, (Laws 1875, 112,) entitled "*An act to regulate the charges of Railroad Companies, and to provide for the appointment of Railroad Commissioners, and to prescribe their powers and duties.*"

It contains 19 sections. Sec. 18 provides, "All acts and parts of acts inconsistent with the provisions of this act are hereby repealed."

In 1879 the statute laws of a general nature were revised

and result embodied in the "REVISED STATUTES OF MISSOURI, 1879."

The act of March 29, 1875, *supra*, to regulate charges of railroad companies and appointing railroad commissioners is continued without change, except that it omits the repealing section (§ 18, *supra*) of the act, and is reprinted in the Revised Statutes of 1879 as Article III, p. 146, *et seq.*

What is repealed by the Revised Statutes of 1879?

See Secs. 3160 and 3161, p. 529.

See also Session Laws 1879, p. 210, "concerning the Revised Statutes 1879 and their effect." Secs. 2, 3.

WE MAINTAIN on the foregoing:

1. That the portions of section 31 in Wagner's Mo. Stats., 1872, *supra*, relating to charges on parcel packages of freights, and authorizing railroad companies to make such contracts as the parties may agree upon as to transporting freight by express or passenger trains, were not repealed by the act of March 29, 1875, as the two acts are not, upon these subjects, inconsistent; nor is the same repealed by the Revised Statutes of 1879, since there is no express repeal, and the act of 1875 was left in 1879 just as the legislature found it.

2. That the act of March 29, 1875, thus continued in force, and the other provisions of the Revised Statutes, 1879, contained in Article II, (p. 125, *et seq.*) particularly Sections 797 to 817, 819, 820, 821, 822, 826, 828, deal with the whole subject of Railway Transportation, and provide for the mischiefs felt, and create a special commission with authority to hear complaints and to remedy them, and confer no equity jurisdiction.

Sec. 821 of the Revised Statutes of Missouri of 1879, still in force, is as follows:

SEC. 821. Railways declared highways and companies common carriers—discrimination prohibited. Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers. *No railway company or corporation or association shall hereafter make any discrimination in charges or facilities in the transportation of freight or passengers between transportation companies and individuals, nor in the transportation of freight between commission merchants or other persons engaged in the transportation of freight, and individuals in favor of either by abatement, drawback or otherwise, nor shall any such company, corporation or association, nor any lessee, manager or employee of any such company, corporation or association make any preference between the parties aforesaid in furnishing cars or motive power for the purpose aforesaid.* And any company, corporation or association or manager, lessee or employee violating the provisions of this section, shall forfeit and pay the party injured the whole amount of such transportation charged, to be recovered before any court of competent jurisdiction: provided, that excursion or commutation tickets may be issued at special rates.

SEC. 797. Train regulations—notice to be given—accommodations to be furnished, &c. Every railroad corporation in this State which now is or may hereafter be engaged in the transportation of passengers or property shall give public notice of the regular time of starting and running its cars and shall furnish sufficient accommodations for the transportation of all such passengers, baggage, mails and express freight, as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, at the junction of other railroads and at the several stopping places; and they are hereby required to stop all trains carrying passengers at the junction or intersection of other railroads a sufficient length of time to allow the transfer of passengers, personal baggage, mail and express freight from

the trains of railroads so connecting or intersecting, or they may mutually arrange for the transportation of such persons and property over both roads without change of cars; and they shall be compelled to receive all passengers and freight from such connecting or intersecting roads whenever the same shall be delivered to them.

KANSAS.

"Compiled Laws of 1879, pp. 225, 226; Chap. 23, Laws of Kansas, A. D. 1868."

SEC. 55. Every railway corporation in this State which now is, or may hereafter be, engaged in the transportation of persons or property, shall give public notice of the regular time of starting and running its cars, and shall furnish sufficient accomodations for the transportation of all such passengers, baggage, mails, and express freight as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, at the junction of other roads, and at the several stopping places; and they are hereby required to stop all trains carrying passengers at the junction or intersection of other railways a sufficient length of time to allow the transfer of passengers, personal baggage, mails, and express freight from the trains or railways so connecting or intersecting, or they may mutually arrange for the transportation of such persons and property over both roads without change of cars; and they shall be compelled to receive all passengers and freight from such connecting and intersecting roads, whenever the same shall be delivered to them.

SEC. 56. No railway corporation shall charge exceeding six cents per mile for the transportation of passengers, except when the amount is a fraction of five cents, in which case the fraction may be added. This section shall not be construed to prevent an additional charge, as provided by the act of Congress, to meet the congressional tax imposed upon all passenger receipts.

SEC. 57. Every such railway shall arrange and classify all property usually carried by them over their roads, and shall

affix thereto the rates respectively at which the same shall be transported between the several stations or points of connection or intersection of other roads, which rates shall be for one hundred pounds, and shall not exceed, for distances less than fifty miles, twenty cents per ton per mile, fifteen cents per ton for second class, and ten cents per ton per mile for third-class articles; for distances of fifty miles and over, but less than one hundred miles, fifteen cents per ton per mile for second-class, and seven cents per mile for third-class articles; for distances of one hundred miles or more, ten cents per mile per ton for first-class, eight cents per ton per mile for second-class, and five cents per ton per mile for third and other classes.

SEC. 58. The provisions of the preceding section shall not be deemed to apply to articles usually considered extra hazardous, as acids, gunpowder, and the like, or especially liable to damage, as looking-glasses, furniture, and the like, or of great bulk in proportion to weight, as baskets, feathers, and the like, or difficult to handle, as heavy machinery, large safes, and the like, nor to live stock and lumber, which may be a rate per car. *Such railway shall be entitled to charge not less than fifty cents for each single package or lot of freight.*

SEC. 59. Such classification, rates, and rules governing transportation shall be posted in all the offices or stations of such companies for the receiving of freight, and shall at all times be open for the examination of the public, and no such corporation shall be entitled to charge more than such published rates; *but nothing in this section shall prevent railway corporations from contracting with shippers for transporting freight by express or passenger trains at such rates as the parties may agree upon.*

SEC. 64. All existing corporations within this State, and such as may be hereafter created and formed, shall respectively have and possess the powers and privileges contained in this article, and they shall be subject to all the duties, liabilities, and provisions contained in this article not inconsistent with the provisions of any charter granted by the legislative assembly of the Territory of Kansas.

KANSAS ACT, MAR. 6, 1883, (Laws 1883, p. 186,) "*concerning railroads and other common carriers,*" creates a Railway Commission with general supervision of all railroads in the State, and all express companies, (sec. 5,) with power to issue subpœnas, examine books, papers, and parties under oath (sec. 8;) to determine what are reasonable charges, and provides for penalties and jury trials, but confers no powers upon courts of equity.

ARKANSAS.

Provisions in present Constitution adopted in 1874.

SEC. 3. All individuals, associations, and corporations shall have equal rights to have persons and property transported over railroads, canals, and turnpikes, and no undue or unreasonable discrimination shall be made in charges for or in facilities for transportation of freight or passengers within the State or coming from or going to any other State.

SEC. 5. No president, director, officer, agent, or employe of any railroad or canal company shall be interested, directly or indirectly, in furnishing of material or supplies to such company, or in the business of a common carrier of freight or passengers over the works owned, leased, controlled or worked by such company. Nor in any arrangement which shall afford more advantageous terms or greater facilities than are offered or accorded to the public.

SEC. 6. "*No discrimination in charges or facilities for transportation shall be made between transportation companies and individuals or in favor of either by abatement, drawback or otherwise, and no railroad or canal company or any lessee, manager or employee thereof shall make any preference in furnishing cars or motive power.*"

Sections 4994–4998 in GANTT'S DIGEST of LAWS of Arkansas, 1873, are not in force, never having been passed by the Legislature, and for this reason are omitted in the

DIGEST OF STATUTES OF ARKANSAS, 1884, (known as MANSFIELD'S DIGEST,) the latter being the Digest now in force. There is no statute in Arkansas regulating the transportation of freight, except upon roads less than 50 miles in length. There is a statute of 1868 that limits passenger rates to five cents per mile on all roads over fifty miles in length; by the act of 1879, roads less than fifty miles long may charge ten cents per mile for passengers, and 40 cents per 100 lbs for freight. (See Mansfield's Digest, 1884, *supra*.)

FILED.
NOV 3 1885
JAMES H. McKENNEY.
CLERK.

SOUTHERN EXPRESS COMPANY.

ACCOUNTING DEPARTMENT.

MEMPHIS, TENN., *June* 13, 1884.

STATEMENT SHOWING REVENUE FROM FREIGHT MATTER *carried over the Iron Mountain and Helena Railway, extending from Helena, Arkansas, to Forrest City, Arkansas, during May, 1884.*

BETWEEN WHAT STATIONS.		AMOUNT.
From all stations	To Helena and way stations south-bound	$ 93 40
From all stations	To Forrest City	27 69
From Helena	To way stations	9 05
		$130 14
	Fifty per cent. for Railway Company.....	$ 65 07

CHAS. L. LOOP,
General Cashier and Auditor, Southern Express Co.

THERN EXPRESS COMPANY. ACCOUNTING DEPARTMENT.

MEMPHIS, TENN.

STATEMENT OF FREIGHT

CARRIED OVER THE

Louis, Iron Mountain & Southern Railway,

MONTH OF MAY, 1884.

Statement of Freight carried over the St. Louis, Iron Mountain

From what Station.	To what Station.		Class.	Weight.	RR. Rate.	Am
St. Louis	Kimmswick		1st	362	$0 19	
Do	Sulpher Sp'gs.		do	63	21	
Do	Bushburg		do	30	23	
Do	Quarantine		do	1,390	17	
Do	De Soto		do	6,266	33	
Do	Victoria		do	240	31	
Do	Mineral Point		do	145	41	
Do	Potosi		do	1,149	46	
Do	Irondale		do	576	45	
Do	Bismarck		do	216	47	
Do	De Lassus	Columbus rate	do	1,324	50	
Do	Fredericktown	do	do	1,389	50	
Do	Lutesville	do	do	1,259	50	
Do	Allensville	do	do	190	50	
Do	Delta	do	do	374	50	
Do	Delta	Freight destined to Cape Girardeau	do	1,344	40	
	St. L., Iron Mt. & South'n R. R. proport'n.					
Do	Morley	Columbus rate	do	448	50	
Do	Charleston		do	675	50	
Do	Columbus		do	7,783	50	
Do	Marquand	Columbus rate	do	100	50	
Do	Ironton		do	50 / 2,573	55	
Do	Arcadia		do	151	57	
Do	Mill Springs		do	229	73	
Do	Granite Bend		do	266	75	
Do	Williamsville		do	233	75	
Do	Poplar Bluff		do	1,249	81	
Do	Dexter		do	648	77	
Do	Essex		do	10	90	
Do	Gray's Ridge		do	26	85	
Do	Sikeston		do	1,072	75	
Do	Harville		do	17	83	
Do	Knobel		do	174	91	
Do	Walnut Ridge		do	1,481	97	
Do	Hoxie		do	317	98	
Do	Hoxie		do	1,023	79	
	St. L., Iron Mt. & South'n R. R. proportion	Fr't destined to points on K. C. S. & M. R.R.				
Do	Swifton		do	86	1 00	
Do	Newport	Little Rock rate	do	4,425	1 00	
Do	Bradford	do	do	26	1 00	
Do	Judsonia	do	do	1,028	1 00	
Do	Kensett	do	do	852	1 00	
Do	Bebee	do	do	880	1 00	
Do	Austin	do	do	136	1 00	
Do	Cabot	do	do	243	1 00	
Do	Little Rock		do	8,248	1 00	
Do	Little Rock	Fr't destined to points on Little Rock and Ft. Smith Railway.				
		To Russellville	do	635		
		To Warren	do	168		
		To Plummersville	do	64		
		To Conway	do	326		
		To Morrillton	do	245		
		To Atkins	do	241		
		St. L., Iron Mt. R.R. proportion	do	1,679	90	

R. Rate.	Am	...what Station.	To what Station.		Class.	Weight.	RR. Rate.	Amount.
50 19		...ouis	Benton	Malvern rate	1st	143	$1 10	$1 57
21		...o	Traskwood	...do	..do	64	1 10	70
23		...o	Malvern		..do	5,871	1 10	64 59
17		...o	Arkadelphia	Texarkana rate	..do	449	1 15	5 16
33		...o	Gurdon	...do	..do	302	1 15	3 47
31		...o	Chidester	Camden rate	..do	12	1 10	25
41		...o	Camden		..do	702	1 10	7 72
46		...o	Prescott	Texarkana rate	..do	490	1 15	5 63
45		...o	Hope	...do	..do	692	1 15	7 96
47		...o	Fulton	...do	..do	367	1 15	4 22
50		...o	Texarkana		..do	22,072	1 15	309 20
50		...o	...do		..do	4,815		
50		...o	...do			286	1 15	3 29
50		...o	Augusta	Little Rock rate	..do	25	1 00	25
50		...nswick	St. Louis		..do	295	19	56
		...oto	...do		..do	977	33	3 23
40		...oria	...do		..do	62	31	25
		...kwell	...do		..do	100	37	37
		...ral Point	...do		..do	25	41	25
50		...si	...do		..do	448	46	2 08
50		...dale	...do		..do	13	45	25
50		...arck	...do		..do	332	47	1 56
50		...assus	...do	Columbus rate	..do	880	50	4 40
55		...ericktown	...do	...do	..do	923	50	4 62
		...aville	...do	...do	..do	5,037	50	25 19
57		...	...do	...do	..do	208	50	1 04
73		...ey	...do	...do	..do	116	50	58
75		...quand	...do	...do	..do	447	50	2 24
75		...leston	...do		..do	44	50	25
81	1	...mbus	...do		..do	56,981	50	284 91
77		...ton	...do		..do	180	55	99
80		...mont	...do		..do	145	69	1 00
85		... Springs	...do		..do	41	73	30
75		...iamsville	...do		..do	16	75	25
83		...ar Bluff	...do		..do	329	81	2 66
91		...ter	...do		..do	1,794	77	13 81
97	1	...x	...do		..do	50	90	45
98		...ston	...do		..do	32	75	25
79		...bel	...do		..do	27	91	25
		...nut Ridge	...do		..do	232	97	2 25
		...ie	...do		..do	124	98	1 21
		...ie	St. Louis	Freights originating at points on K. C. S. & M. R.R.				
0			St. L., Iron Mt. & South'n R. R. proportion		..do	1,217	79	9 61
0	4							
0		...ton	St. Louis		..do	15	1 00	25
0	1	...sport	...do	Little Rock rate	..do	605	1 00	6 05
0		...ilford	...do	...do	..do	349	1 00	3 49
0		...ponia	...do	...do	..do	229	1 00	2 29
0		...sett	...do	...do	..do	66	1 00	66
0	82	...ee	...do	...do	..do	239	1 00	2 39
		...tin	...do	...do	..do	472	1 00	4 72
		...at	...do	...do	..do	301	1 00	3 01
		...le Rock	...do		..do	3,366	1 00	33 66
		...Smith's Crossing	...do	Little Rock rate	..do	82	1 00	82
		...ton	...do	Malvern rate	..do	304	1 10	3 34
		...vern	...do		do	1,127	1 10	12 40
		...adelphia	... do	Texarkana rate	..do	160	1 15	1 84
		...don	...do	...do	..do	13	1 15	25
		...den	...do		..do	9	1 10	25

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Statement of Freight carried over the St. Louis, Iron Mountain

From what Station.	To what Station.		Class.	Weight.	RR. Rate.
Prescott	St. Louis	Texarkana rate	1st	12	1 15
				146	
Hope	do	do	do	26	1 15
Fulton	do	do	do	119	1 15
Texarkana	do		do	15,102	1 15
Columbus	Charleston		do	1,823	30
Do	Poplar Bluff		do	46	48
Do	Newport		do	45	96
Do	Oran, Mo.		do	262	40
Do	Fredericktown	St. Louis rate	do	240	50
Do	Arcadia		do	14	69
Do	Lutesville		do	845	48
Do	Blodgett		do	110	34
Do	Morley		do	96	36
Do	Bertrand		do	70	32
Do	Malvern		do	17	1 25
Do	Irondale		do	10	64
De Soto	Columbus	St. Louis rate	do	17	50
Lutesville	do		do	74	48
Delta	do		do	20	40
Irondale	do		do	5	64
Benton	do	Texarkana rate	do	5	1 25
Morley	do		do	8	36
Charleston	Columbus		do	403	30
Do	Poplar Bluff		do	195	48
Do	Malvern	Cairo & Tex. rate	do	11	1 25
Do	Dexter		do	4	37
Do	Williamsville		do	52	56
Do	De Soto	St. Louis rate	do	75	50
Sikeston	Charleston		do	8	23
De Lassus	do	St. Louis rate	do	290	50
Newport	do		do	22	85
Dexter	do		do	50	37
Williamsville	do		do	52	56
Parmey	do		do	35	72
Cairo	Texarkana	(see correction sheet 38)	do	4,661	1 25
Do	Malvern	Texarkana rate	do	510	1 25
				447	
Do	Little Rock		do	739	1 00
Do	Poplar Bluff		do	3,525	48
Do	Essex		do	95	40
Do	Buffington		do	351	36
Do	Piedmont		do	87	60
Do	Harviell		do	271	51
Do	Mill Springs		do	7	56
Do	Fulton	Texarkana rate	do	16	1 25
Do	Arcadia		do	45	69
Do	Delta		do	174	40
Do	Hickory Creek	Texarkana rate	do	4	1 25
Do	Ash Hill		do	15	46
Do	Neelyville		do	58	54
Do	Dielstadt		do	8	32
Do	Forrest City		do	31	95
Do	Knobel		do	138	63
Do	St Louis		do	79	40
Do	Fredericktown	St. Louis rate	do	12	40
Do	Keener's		do	10	51
Do	Gurdon	Texarkana rate	do	51	1 25
Do	Judsonia	Little Rock rate	do	5	1 00
Do	Kensett	do	do	34	1 00
Do	Newport		do	48	96

& Southern Railway, month of May, 1884—Continued.

R. Rate.	At	n what Station.	To what Station.		Class.	Weight.	RR. Rate.	Amount.
		C.....	Corning	.....	1st	250	$0 60	$1 50
1 15		do.....	Arkadelphia ...	Texarkana rate.....	..do...	115	1 25	1 44
1 15		do.....	Little River....	.....	..do...	5	36	35
1 15		do.....	Gainesville.....	.....	..do...	61	72	44
1 15		o.....	Traskwood.....	Texarkana rate.....	..do...	50	1 25	62
30		do.....	De Soto.....	St. Louis rate.....	..do...	23	40	25
48		do.....	Morley.	....	..do...	92	36	33
96		do.....	Doniphan	....	..do...	70	66	46
40		do.....	Bebee	Little Rock rate.....	..do...	20	1 00	25
50		port	Cairo	.....	..do...	35	96	34
69		onia.....	.....do.....	Little Rock rate.....	..do..	244	1 00	2 44
48		e.....	.....do	.....do	..do...	136	1 00	1 36
34		in	.....do	.....do	..do...	35	1 00	35
36		t	.....do	.....do	..do...	175	1 00	1 75
32		delphia....	.....do	Texarkana rate.....	..do...	6	1 25	25
1 25		ing.....	.....do.....	....	..do...	2	60	25
64		ville.....	.....do.....	.....	..do...	66	48	32
50		yville.....	....do.....	.....	..do...	75	54	40
48		ton.....	.....do.....	.....	..do...	10	68	25
40		amsville.....	.....do.....	.....	..do...	95	54	51
64		tton.....	.....do.....	....	..do...	20	34	25
1 25		ar Bluff.....	Cairo	.....	..do...	2,178	48	10 45
36		o.....	Lutesville.....	.....	..do...	13	68	25
30		o.....	Parmey.....	.....	..do...	122	46	56
48		o.....	Dexter.....	.....	..do...	10	30	25
1 25		o.....	Neelyville.. ...	.....	..do...	50	23	25
37		o.....	Little Rock....	.....	..do...	14	91	25
56		o.....	Texarkana.....	St. Louis-Texas rate...	..do...	9	1 15	25
50		o.....	Bebee	.....	..do...	12	82	25
23		o.....	Arcadia.....	.....	..do...	10	56	25
50		o.....	Corning.....	.....	..do...	45	30	25
85		o..	Harviell.....	.....	..do...	8	19	25
37		o.....	Ironton.....	.....	..do...	38	56	25
56		o.....	Junks, Mo.....	.....	..do...	105	48	50
72		o.....	Mill Springs...	....	..do...	.....	error	
1 25		o.....	Kensett	.....	..do...	20	76	25
1 25		o.....	Williamsville..	....	..do...	5	27	25
1 00		o.....	Hoxie.....	.....	..do ..	248	52	1 30
		ton.....	Poplar Bluff...	.....	..do...	51	56	29
48		riell.....	.....do.....	.....	..do...	30	19	25
40		ing.....	..... do.....	.....	..do...	45	30	25
36		oto.....	.....do.....	.....	..do...	5	76	25
60		e	.....do.....	.....	..do...	304	82	2 49
51		in.....	.....do.....	....	..do...	230	85	1 95
56		nut Ridge.....	.... do.....	....	..do...	10	48	25
1 25		port.....	.....do.....	.....	..do...	27	64	25
69		onia	.....do.....	....	..do...	585	76	4 45
40		er	.....do.....	.....	..do...	78	30	25
1 25		e Rock.....	Benton	.....	..do...	956	30	2 87
46		o	Gurdon	....	..do...	651	58	3 78
54		o	Hope	....	..do...	563	67	3 77
32		o.....	Texarkana.....	.....	..do...	2,555	80	20 44
95		o.....	Cabot	.....	..do...	396	30	1 19
63		o.....	Austin	.....	..do...	151	32	48
40		o.....	Bebee..	.....	..do ..	1,195	37	4 42
40		o.....	Judsonia.....	....	..do...	254	47	1 19
51		o.....	Newport	.....	..do...	836	58	4 85
1 25		o	Walnut Ridge	.....	..do...	241	70	1 69
1 00		o.....	Corning.....	.....	..do...	86	83	71
1 00		o.....	Poplar Bluff...	.....	..do...	1,176	91	10 70
96		o.....	Hoxie	.....	..do...	552	72	3 96

Statement of Freight carried over the St. Louis, Iron Mountain

From what Station.	To what Station.		Class.	Weight.	RR. Rate.	An
Little Rock	Traskwood		1st	228	$0 36	
Do	Cairo		do	199	1 00	
Do	Kurbel		do	26	81	
Benton	Little Rock		do	410 485	30	
Camden	do		do	90	72	
Arkadelphia	do		do	94	52	
Gurdon	do		do	262	58	
Prescott	do		do	75	62	
Hope	do		do	66	67	
Russell	do		do	24	50	
Cabot	do		do	738	30	
Austin	do		do	486	32	
Bebee	do		do	751	37	
Kensett	do		do	5	44	
Judsonia	do		do	172	47	
Newport	do		do	267	58	
Gainesville	do		do	10	85	
Hoxie	do		do	271	70	
Malvern	Texarkana		do	521	64	
Do	Cairo		do	512	1 25	
Do	Fulton		do	11	58	
Do	Hope		do	78	52	
Do	Hoxie		do	185	91	
Do	Benton		do	151	27	
Do	Piedmont	St. Louis rate	do	68	10	
Do	Kensett		do	13	62	
Do	Charleston	Cairo rate	do	8	1 25	
Do	Homan		do	80	60	
Do	Camden		do	11	52	
Hoxie	Malvern		do	159	91	
Kimmswick	do	St. Louis rate	do	48	1 10	
Fulton	do		do	490	58	
Hope	do		do	400	52	
Prescott	do		do	110	46	
Benton	do		do	230	27	
Austin	do		do		error	
Bebee	do		do	102	56	
Judsonia	do		do	99	64	
Arkadelphia	do		do	149	30	
Camden	do		do	5	52	
Texarkana	Little Rock		do	20,984	80	
Do	Malvern		do	1,096	64	
Do	Camden		do	19	62	
Do	Cairo		do	1,873	1 25	
Do	Hope		do	208	37	
Do	Fulton		do	20 1,992	26	
Do	Benton		do	41	70	
Do	Judsonia		do	55	1 00	
Do	Harviell	St. Louis rate	do	55	1 15	
Do	Arkadelphia		do	603	56	
Do	Homan		do	200	22	
Do	Hoxie	St. Louis rate	do	241	1 15	
Do	Newport		do	60	1 09	
Do	Austin		do	7	91	
Do	Glen Allen		do	32	1 50	
Do	Traskwood		do	12	68	
Do	Gurdon		do	10	49	
Do	Kensett		do	21	99	
Do	Curtias		do	20	52	

& Southern Railway, month of May, 1884—Continued.

Rate.	Am	...m what Station.	To what Station.		Class.	Weight.	RR. Rate.	Amount.
0 36		...kana	Knob Lick		..1st..	160	$1 50	$2 40
1 00		...o	Popiar Bluff		..do...	18	1 15	25
81		...n	Texarkana		..do...	299	26	78
		...	...do		..do..	734	37	2 72
30		...nia	...do		..do...	66	1 00	66
72		...ett	...do		..do...	5	99	25
52		...len	...do		..do...	163	62	1 01
58		...m	...do		..do...	180	91	1 64
62		...	...do		..do...	153	94	1 44
67		...ton	...do		..do...	440	70	3 08
50		...t	...do		..do...		error	
30		...iell	...do	St Louis rate	..do...	570	1 15	6 55
32		...er	...do	Cairo rate	..do...	89	1 25	1 11
37		...ton	...do	St. Louis rate	..do...	6	1 15	25
44		...nswick	...do	...do	..do...	50	1 15	57
47		...port	...do		..do...	30	1 09	32
58		...e	...do	St. Louis rate	..do...	189	1 15	2 17
85		...est City	Knobel		..do...	1,930	64	12 35
70		Do	Colts		..do...	13	19	25
64		Do	Wynne		..do...	31 / 819	23	1 95
25		Do	Vaundale		..do...	181	30	54
58		Do	Harrisburg		..do...	124	40	50
52		Do	Nettleton		..do...	50	48	25
91		Do	Powell		..do...	50	50	25
27		Do	Parmly		..do...	253	56	1 43
10		Do	Gainesville		..do...	115	58	67
62		Do	Newport		..do...	7	91	25
25		Do	Camden		..do...	30	143	43
60		...bel	Forrest City		..do...	1,955	64	12 51
52		...esville	Do.		..do...	561	58	3 25
91		...ly	Do		..do...	329	56	1 84
10		...ell	Do		..do...	25	50	25
58		...leton	Do		..do...	913	48	4 38
52		...risburg	Do		..do...	16	40	25
46		...ndale	Do		..do...	24	30	25
27		...ne	Do		..do...	100	23	25
ror		...	Do		..do...	115	19	25
56		...rick	Do		..do...	250	34	85
64		...ly	Mill Springs		..do...	200	58	1 16
30		Do	Gainesville		..do...	36 / 17	19	25
52	16							
80		Do	Knobel		..do...	35	30	25
64		Do	Ironton		..do...	5	79	25
62		Do	Corning		..do...	4	34	25
25		Do	Newport		..do...	7	60	25
37		Do	Harrisburg		..do ..	25	40	25
26		...esville	Parmly		..do...	288	19	55
70		Do	Vanndale		..do...	128	52	67
00		Do	Nettleton		..do...	318	34	1 08
15		Do	Harrisburg		..do...	60	42	25
56		Do	Knobel		..do...	12	27	25
22		...risburg	Vanndale		..do..	25	27	25
15		Do	Parmly		..do...	5	40	25
09		...leton	Knobel		..do...	30	40	25
91		Do	Gainesville		..do...	12	34	25
50		...assus	Piedmont		..do...	182	50	91
68		Do	Irondale		..do...	23	27	25
49		Do	Arcadia		..do...	4	30	25
99		Do	Delta		..do...	60	50	30
52		...oto	Potosi		..do...	15	30	25

Statement of Freight carried over the St. Louis, Iron Mountain

From what Station.	To what Station.		Class.	Weight.	RR. Rate.
De Soto	Bismarck		1st	6	$0 37
Fredericktown	De Soto		do	44	50
Do	De Lassus		do	4	27
Do	Lutesville		do	8	34
Lutesville	Ironton		do	100	52
Do	Irondale		do	38	50
Do	Bismarck		do	17	48
Do	Delta		do	233	28
Do	Pilot Knob		do	100	52
Do	De Lassus		do	182	44
Do	De Soto	St. Louis & Col. rate	do	100	50
Do	Marquand		do	28	23
Bismarck	Mine La Motte		do	5	34
Mineral Point	Delta	St. Louis & Col. rate	do	8	50
Do	Blackwell		do	8	19
Do	Irondale		do	44	19
Piedmont	Lutesville		do	80	68
Do	Parmly		do	20	62
Do	Granite Bend		do	21	27
Do	Irondale		do	28	48
Do	Ironton		do	5	40
Do	De Soto		do	6	58
Do	Williamsville		do	15	27
Morley	De Soto		do	30	72
Do	Mineral Point		do	60	68
Potosi	De Soto		do	55	30
Dexter	Buffington		do	35 10	23
Do	Oran, Mo.		do	4	50
Do	Harviell		do	9	37
Do	Gainesville		do	60	54
Do	Sikeston		do	140	30
Essex	Hoxie		do	11	64
Do	Sikeston		do	19	23
Williamsville	Mill Springs		do		error
Carondelet	Hoxie		do	375	98
Mill Springs	Granite Bend		do	34	23
Arcadia	Fredericktown		do	24	42
Ironton	Irondale		do	40	27
Do	Piedmont		do	13	40
Do	Granite Bend		do	8	48
Do	Mill Springs		do	73 175	44
Do	Williamsville		do	42	48
Do	Mineral Point		do	4	34
Do	De Soto		do	6	42
Hoxie	Walnut Ridge		do	5	19
Do	De Soto		do	18	97
Do	Dexter		do	85	58
Do	Harviell		do	25	48
Do	Piedmont		do	6	68
Do	Cabot		do	69	64
Do	Bradford		do	4	46
Do	Kensett		do	82	54
Do	Bebee		do	251	60
Do	Newport		do	319	40
Do	Swifton		do	4	27
Do	Judsonia		do	104	52
Do	Tuckerman		do	10	30
Newport	Kensett		do	125	37
Do	Bradford		do	86	27

Mountain

& Southern Railway, month of May, 1884—Continued.

RR. Rate.	At what Station.	To what Station.		Class.	Weight.	RR. Rate.	Amount.
$0 37	ort	Forrest City		1st	5	$0 91	$0 25
50		Judsonia		do	48	34	25
27		Hoxie		do	405	40	1 62
34		Swifton		do	16	27	25
52		Burton		do	175	68	1 19
50		Parmly		do	12	60	25
48		Harrisburg		do	12	91	25
28	n	Walnut Ridge		do	15	27	25
52	g	Peach Orchard		do	109	28	25
44		Nettleton		do	35	44	25
50		Knobel		do	119	19	25
23		Parmly		do	14	34	29
34					70		
50		Hoxie		do	20	40	25
19	swick	Williamsville		do	4	76	25
19		Potosi		do	210	42	88
68		Hoxie		do	20	106	25
62		De Soto		do	52	30	25
27	ia	Hoxie		do	424	52	2 20
48		Newport		do	175	34	59
40		Walnut Ridge		do	17	52	25
58		Hope		do	413	91	3 76
27		Bebee		do	10	27	25
72		Benton		do	47	48	25
68		Hope		do	200	82	1 64
30		De Soto	St. Louis & S. R. rate	do	34	100	34
23		Austin		do	18	19	25
		Walnut Ridge		do	17	60	25
50		Hoxie		do	271	60	1 63
37		Newport		do	106	44	47
54		Bismarck	St. Louis & S. R. rate	do	34	100	34
30		Fulton		do	34	85	29
64		Piedmont		do	65	100	65
23		Judsonia		do	46	34	25
error		Corning		do	130	76	99
98		Hoxie		do	80	62	50
23		Gurdon		do	35	68	25
42		Hope		do	230	79	1 82
27		Camden		do	100	79	79
40		Prescott		do	65	76	49
48		Fulton		do	65	82	58
44		Knobel		do	630	76	4 79
	t	Hoxie		do	270	64	1 73
48		Searcy		do	10	91	25
34		Arkadelphia		do	5	44	25
42		Prescott		do	100	23	25
19		Fulton		do	40	23	25
97	lon	Fulton		do	19	42	25
58		Camden		do	1,530	34	5 20
48		Arkadelphia		do	24	27	25
68	n	Hope		do	495	23	1 14
64		Arkadelphia		do	95	48	46
46		Prescott		do	180	34	61
54		Alexander		do	210	72	1 51
60		Cabot		do	30	82	25
40	len	Gurdon		do	1,550	34	5 27
27		Fulton		do	10	56	25
52		Hope		do	5	50	25
30		Chidester		do	62	23	25
37		Prescott		do	65	44	29
27	n	Neelyville		do	20	97	25

Statement of Freight carried over the St. Louis, Iron Mountain

From what Station.	To what Station.		Class.	Weight.	RR. Rate.	Amount.
Benton	Arkadelphia		1st.	105	$0 42	$0 44
Do	Hoxie		do	300	82	2 46
Prescott	Hope		do	670	23	1 54
Do	Gurdon		do	95	23	25
Do	Camden		do	18	44	25
Do	Fulton		do	44	34	25
Do	Bierne		do	94	23	25
Arkadelphia	Prescott		do	47	37	25
Kennett	Hoxie		do	2	54	25
Do	Bebee		do	10	27	25
Hoxie	Mill Springs		do	18	64	25
Walnut Ridge	Knobel		do	90	34	31
Bradford	Hoxie		do	90	46	41
Ironton	Bismarck		do	14	23	25
Piedmont	Mill Springs		do	44	19	25
Ft Smiths Crossing	Hoxie		do	187	72	1 35
	Addition					
Delta	Gainesville		do	10	79	25
Cairo	Bebee		do	2	100	25
These two items in April account without am't inserted. "Between"						
St. Louis and	Columbus	Freight from St. Louis, Mo., to Memphis, via Rives	do	6,259	50	31 30
Do	do	Freight from Memphis to St. Louis, via Corinth	do	2,652	50	13 26
Do	do	Freight between St. Louis and New Orleans, via Jackson, Tenn	do	8,179	50	40 90
Do	do	Fr't between St. Louis and Mobile, via Columbus, Ky	do	1,027	50	5 14
Do	do	Fr't between St. Louis and Pensacola, via Mobile and Columbus, Ky	do	18,456	50	92 28
Little Rock	Texarkana	Freight from New York to Texas, via Penn. R.R. to Cin'ti. thence via L. & N. R.R. to Memphis, thence via M. & L. R. R.R. to Little Rock	do	16,665		
Do	do	Freight from Philadelphia to Texas, via Penn. R.R. to Cin'ti, thence via L. & N. R.R. to Memphis, thence via M. & L. R. R.R. to Little Rock	do	1,445		
Do	do	Freight from Baltimore to Texas, via Va. Mid. R.R. to Bristol, thence via E. T. V. & Ga. R.R. to Chatta., thence				

I have no rates on this business, not having been furnished with proportions and amount received by the St. Louis, Iron Mountain and Southern Railway Company on such business; hence I am unable to extend amount and pay, but am ready and anxious to settle for this business, and will do so as soon as I am furnished with rates, or such amount as may be due, in view of Pacific Express Company's arrangement, as per my letter, August 13, 1868, to C. G. Warner, General Auditor.

C. L. LOOP,
Aud. South'n Ex. Co., per R. A. B.

& Southern Railway, month of May, 1884—Continued.

From what Station.	To what Station.		Class.	Weight.	RR. Rate.	Amount.
		via M. & C. R.R. to Memphis, thence via M. & L. R. R.R. to Little Rock				
Little Rock	Texarkana	Freight from Nashville to Texas, via N. & N. W. to McKenzie, thence via L. & N. R.R. to Memphis, thence via M. & L. R. R.R. to Little Rock	..1st..	1,117		
			..do...	1,368		
Do	do	Freight from Memphis to Texarkana, via M. & L. R. R.R. to Little Rock	..do...	78		
Do	do	Freight from Memphis to Texas, via M. & L. R. R. R. to Little Rock	..do...	3,925		
			..do...	338		
				3,500		
Cairo	do	Freight from Chicago to Texas, via Ills. C. R.R. to Cairo, thence via Poplar Bluff and Texarkana	..do...	6,507		
Little Rock	do	Freight from N. Y. to Texarkana, via Pa. R. R. to Cin'ti, thence via L. & N. R.R. to Memphis, thence via M. & L. R. R. R. to Little Rock	..do...	1,757		
Freight from points east of Decatur, Ala., destined to Texas, via Memphis, Little Rock, and Texarkana.						
Little Rock	Texarkana	Freight from Atlanta, Ga., to Texas, via W. & A. R R. to Chattanooga, thence via M. & C. R.R. to Memphis, thence, via M. & L. R. R.R. to Little Rock	..do...	1,033		
Do	do	Freight from Chattanooga and points east thereof, destined to Texas, via Memphis, Little Rock & Texarkana	..do...	1,377		
St. Louis	De Soto	Hardware, seed, news p., groceries	...2d...	10,51	$0 30	$3 15
Do	Victoria	Seed, hardware, leather	..do...	259	28	73
Do	Potosi	Q'ware, hardware, harness, news, saddlery, cheese, vegetables	..do...	336	41	1 38
Do	Irondale	Harness, Q. ware	..do...	93	39	36

I have no rates on this business, not having been furnished with proportions and amount received by the St. Louis, Iron Mountain & Southern Railway Company on such business; hence I am unable to extend amount and pay, but am ready and anxious to settle for this business, and will do so as soon as I am furnished with rates, or such amount as may be due in view of Pacific Express Company's arrangement, as per my letter, August 13, 1883, to C. G. Warner, General Auditor.

C. L. LOOP,
Aud. South'n Ex. Co., per R. A. B.

Statement of Freight carried over the St. Louis, Iron Mountain

From what Station.	To what Station.		Class.	Weight.	RR. Rate.	Amount.
St. Louis	Bismark	Vegetables, wire, Q. ware and hard ware	2d	127	$0 40	$0 51
Do	De Lassus	Hardware, saddlery, beer	do	518	40	2 07
Do	Fredericktown	News, hardware, seed, groceries	do	450	40	1 80
Do	Lutesville	Cheese, news p., groceries, hardware	do	441	40	1 76
Do	Delta	Newspaper ink, hardware	do	206	40	82
Do	Delta	Freight destined to Cape Girardeau.				
	St. L., I. M'n & S. R.R. proportion	Hardware, rope, seed, newspapers and eggs	do	564	32	1 80
Do	Charleston	Sadlery, Q. ware and hardware	do	81	35	28
Do	Columbus	Newspapers, eggs, groceries, type, seed, cheese and butter	do	1,177	40	4 71
Do	Ironton	Groceries, hardware, seed, newspapers	do	509	47	2 39
Do	Piedmont	Butter, newpapers, h' ware and harness	do	513	57	2 92
Do	Kimmswick	Rope, saddlery and h' ware	do	178	16	28
Do	Mill Springs	Groceries, hardware & newspapers	do	133	60	80
Do	Granite Bend	Hardware	do	63	62	39
Do	Williamsville	Groceries & hardware	do	97	62	60
Do	Poplar Bluff	Queensware & h'ware, newspapers, groc	do	732	66	4 83
Do	Dexter	H'ware. newspapers, seed & leather	do	912	77	7 02
Do	Sikeston	Queensware & h'ware, leather & canvas	do	806	60	4 84
Do	Corning	Hardware, newspapers, queensware	do	353	72	2 54
Do	Walnut Ridge	Hardware	do	116	80	93
Do	Hoxie	Rope & groceries	do	180	80	1 44
Do	Hoxie	Freight destined to points on K. C. S. & M. R.R.			L. Rock rate.	
	St. L., I. M. & So.Ry. pro'n	Newspapers, hardware, queensware	do	570	79	4 50
Do	Swifton	Seed	do	50	80	40
Do	Newport	Saddlery, eggs, hardware, seed, groceries, wood, type & newspapers, & q'ware	do	1,067	80	8 54
Do	Judsonia	Hardware	do	230	80	1 84
Do	Kensett	Q'ware & hardware	do	148	80	1 18
Do	Bebee	Newspapers, saddlery hardware and groc	do	387	80	3 10
Do	Little Rock	H'ware, eggs, type, butter, q'ware, groceries, newspapers and seed	do	4,011	L. Rock rate. 80	32 09

& Southern Railway, month of May, 1884—Continued.

From what Station.	To what Station.		Class.	Weight.	RR. Rate.	Amount.
St. Louis	Little Rock	Freight delivered to points on the Little Rock and Ft. Smith R.R.:				
		To Russellville—eggs and hardware	2d	282		
		To Warre — queensware and hardware	do	69		
		To Atkins—groceries and hardware	do	140		
	St. L., I. M. & S. R. R. proportion		do	491	$0 75	$3 68
Do	Benton	Newspapers, groceries, and hardware	do	269	90	2 42
Do	Malvern	H'dware, butter, vegetables, eggs	do	1,706	90	15 35
Do	Arkadelphia	Seed, qu'nsware, hardware, and groceries	do	191	1 00	1 91
Do	Gurdon	Nuts and cheese	do	66	1 00	66
Do	Camden	Butter and hardware	do	311	1 00	3 11
Do	Prescott	Groceries, hardware, type, newspapers, and leather	do	596	1 00	5 96
Do	Hope	Harness, type, hardware	do	195	1 00	1 95
Do	Fulton	Nuts and hardware	do	328	1 00	3 28
Do	Texarkana	Hardware, newspapers eggs, groceries, felting, and wire	do	6,132	1 00	61 32
Kimmswick	St. Louis	Butter and eggs	do	357	16	58
Potosi	do	Butter and eggs	do	81	41	32
Bismarck	do	Soap, box castings	est rate.	145	40	58
De Lassus	St. Louis	Eggs	do	2,700	40	10 80
Fredricktown	do	Butter and eggs	do	1,040	40	4 16
Lutesville	do	Eggs	do	2,333	40	9 33
Marquand	do	Butter and eggs	do	230	40	92
Charleston	do	Harness & hardware	do	85	35	30
Columbus	do	Vegetables, eggs and cheese	do	31,436	40	125 74
Hoxie	do	Freight originating on K. C. S. & M. R. R.				
	St. L., I. M. & S. Ry. prop.	Hardware, eggs and butter	do	185	79	1 46
Newport	St. Louis	Hardware & butter	do	73	80	58
Judsonia	do	Vegetables	do	7,082	80	56 66
Kensett	do	do	do	174	80	1 39
Bebee	do	do	do	85	80	68
Austin	do	do		3,706	80	29 65
Cabot	do	do		1,190	80	9 52
Little Rock	do	Newspapers and vegetables	do	872	80	6 98
Texarkana	do	Newspapers & veg'bles	do	1,254	1 00	12 54
Columbus	Charleston	Eggs and vegetables	do	165	25	41
Cairo	Texarkana	Butter, eggs and hardware	do	1,789	1 09	19 50
Do	Malvern	Butter	do	409	1 09	4 46
Do	Charleston	Veg. and h'ware	do	107	25	27
Do	Dexter	Case beer, groceries and cheese	do	186	37	69
Do	Knobel	Groceries and butter	do	110	56	62

Little R'k rate. Tex'k. rate. T. rate. M. rate. Col. rate.

Statement of Freight carried over the St. Louis, Iron Mountain

From what Station.	To what Station.		Class.	Weight.	RR. Rate.	Amount.
Cairo	St. Louis	Vegetables	2d	115	$0 30	$0 34
Do	Gray's Ridge	Case beer	..do...	100	33	33
Dexter	Cairo	Butter, eggs, vegetables	..do...	1,117	37	4 13
Essex	..do..	Eggs	..do...	291	35	1 02
Kensett	..do..	Vegetables	..do...	100	94	94
Poplar Bluff	Nellyville	Bacon	..do...	95	19	25
Do	Corning	Case beer	..do...	400	25	1 00
Dexter	Poplar Bluff	Vegetables, eggs, butter	..do...	791	25	1 98
Harviell	.. do ..	Vegetables, eggs, butter	..do...	247	16	40
Little Rock	Benton	Case beer	..do...	100	25	25
	Malvern	Seed, gum, leather and wagon wheels	..do...	396	33	1 31
Do	Prescott	Hardware and leather	..do...	406	50	2 03
Do	Texarkana	Seed, wire, cheese, butter and chinaware	..do...	259	65	1 68
Do	Bebee	Groceries and case beer	..do...	135	30	40
Do	Hoxie	Veg. and saddlery	..do...	133	58	77
Cabot	Little Rock	Butter, eggs	..do...	119	25	30
Austin	..do..	..do	..do ..	549	26	1 43
Bebee	..do..	Eggs	..do...	360	30	1 08
Judsonia	..do..	Vegetables and butter	..do ..		error	
Hoxie	..do..	Butter	..do..	442	58	2 56
Malvern	..do..	Eggs and chain	..do...	297	33	98
Hope	Malvern	Vegetables	..do...	135	44	59
Benton	..do..	..do	..do...	40	27	25
Texarkana	..do..	..do	..do...	2,100	52	10 92
Gainesville	Forrest City	Eggs	..do...	840	50	4 20
Parmly	..do	..do	..do...	300	48	1 44
Powell	..do	..do	..do...	475	42	1 99
Wynne	..do..	..do	..do...	80	19	25
Colts	..do..	.. do	..do...	100	16	25
Hydrick	..do..	Butter and eggs	..do...	360	28	1 01
De Lassus	De Soto	Butter	..do...	107	34	36
Dexter	Buffington	Eggs and vegetables	..do...	195	19	37
Do	Sikeston	..do	..do...	90	25	25
Blackwell	De Soto	Eggs	..do...	240	16	38
Judsonia	Hoxie	Vegetables	..do...	300	44	1 32
Newport	..do..	..do	..do...	280	32	90
Do	Bebee	Case beer	..do...	75	36	27
Do	Judsonia	Soda water	..do...	240	28	67
Cabot	Hoxie	Vegetables	..do...	75	56	42
Camden	Chidester	..do	..do...	100	19	25
Corning	Knobel	Eggs	..do...	100	16	25
St. Louis	Sikeston	Marble slabs	3d	470	55	2 58
Do	Texarkana	Alum	..do...	450	85	3 82
Columbus	St. Louis	Rice	..do...	650	30	1 95
Charleston	..do..	Burlaps	..do...	60	30	25
		see addition on sheet 38				
Cairo	Texarkana	Wood in shape, boxed	..do...	1,300	93	12 09
Do	Poplar Bluff	Keg soda	..do...	120	36	43
Do	Sikeston	White lead	..do...	50	26	25
Poplar Bluff	Cairo	Keg soda	..do...	233	36	84
Little Rock	Texarkana	Wood in shape, boxed	..do...	1,582	55	8 70
Do	Judsonia	White lead	..do...	50	34	25
Do	Cabot	..do	..do ..	100	23	25

& Southern Railway, month of May, 1884—Continued.

From what Station.	To what Station.		Class.	Weight.	RR. Rate.	Amount.
Texarkana	Cairo	Brooking	3d	100	$0 93	$0 93
Little Rock	Kensett	White lead	do	50	32	25
St. Louis	Kimmswick	Beer	4th	630	12	76
Do	De Soto	Whiskey and beer	do	8,889	20	17 78
Do	De Lassus	do	do	165	25	41
Do	Fredericktown	do	do	8,595	25	21 49
Do	Columbus	Cat'g (200) and beer	do	2,630	25	6 58
Do	Sikeston	Whiskey	do	100	48	48
Do	Corning	do	do	250	48	1 20
Do	Walnut Ridge	Glass	do	70	54	38
Do	Newport	Whiskey	do	45	50	25
Do	Kensett	do	do	100	50	50
Do	Little Rock	do	do	200	50	1 00
Do	Texarkana	Glass, whiskey, casting (115)	do	292	75	2 19
Ironton	St. Louis	Wine	do		error	
Lutesville	do	Green hides	do	80	25	25
Marquand	do	do	do	50	25	25
Columbus	do	Cotton, glass, vinegar	do	229	25	57
Do	Charleston	M. T. beer kegs	do	720	19	1 37
Do	Arcadia	Lard	do	165	43	71
Cairo	Poplar Bluff	Ice	do	4,000	32	12 80
Do	Charleston	Wiskey and cabbage	do	195	19	37
Do	Dexter	Beer and ice	do	3,340	29	9 69
Do	Buffington	Ice	do	100	25	25
Do	Gray's Ridge	Beer	do	1,440	27	3 89
Poplar Bluff	Piedmont	Beer	do	180	24	43
Do	Knobel	do	do	270	22	59
Little Rock	Benton	Whiskey and beer	do	464	18	84
Do	Malvern	Glass, whiskey & ice	do	397	25	99
Do	Arkadelphia	Whiskey	do	56	32	25
Do	Gurdon	Iron pipes & whiskey	do	117	38	44
Do	Prescott	Casting (100)	do	100	41	41
Do	Texarkana	Whiskey, casting 180	do	270	48	1 30
Do	Cabot	Beer, whiskey & ice	do	857	18	1 54
Do	Austin	Whiskey and ice	do	226	19	43
Do	Bebee	do	do	1,074	23	2 47
Do	Kensett	Whiskey	do	61	27	25
Do	Judsonia	Glass, ice, beer	do	630	29	1 83
Do	Hoxie	Glass	do	43	45	25
Do	Traskwood	Whiskey	do	90	21	25
Do	Boughton	Casting (470)	do	470	40	1 88
Prescott	Little Rock	Whiskey	do	150	41	61
Do	Gurdon	Ice	do	50	14	25
Malvern	Little Rock	Water	do	210	25	52
Do	Arkadelphia	Whiskey	do	200	18	36
Texarkana	Little Rock	Cotton	do	211	48	1 01
Do	Prescott	Beer and cabbage	do	395	26	1 03
Do	Fulton	Ice, beer, cab'ge, whis'y	do	1,470	16	2 35
Do	Arkadelphia	Cabbage	do	125	36	49
Do	Gurdon	Ice, cabbage and beer	do	940	30	2 82
Forrest City	Vaundale	Ice	do	100	18	25
Do	Harrisburg	Ice and beer	do	390	24	94
Newport	Kensett	Whiskey	do	95	22	25
Do	Bradford	Whiskey	do	94	16	25
Do	Judsonia	Whiskey and beer	do	589	20	1 18
Do	Walnut Ridge	Beer	do	450	24	1 08
St. Louis	Piedmont	Whiskey	do	50	38	25
Hope	Fulton	Ice	do	170	14	25

Statement of Freight carried over the St. Louis, Iron Mountain

From what Station.	To what Station.		Class.	Weight.	RR. Rate.	Amount.
St. Louis	Prescott	Fruit	These rates are what the Pacific Express Co. charges the public.	295	$1 50	$4 42
Do	Texarkana	Fish		460	1 50	6 90
Blackwell	St. Louis.	Eggs		270	45	1 22
Potosi	do	Butter and eggs		230	50	1 15
Luteaville	do	Fruit		132, 129	65	858 84
Dexter	do	Eggs		2, 540	75	19 05
Hoxie	do	do		240	1 00	2 40
Newport	do	do		2, 640	1 00	27 55
Do	do	Fruit		116		
Prescott	do	do		600	1 50	9 00
Benton	do	do		1, 910	1 50	28 65
Bradford	do	do		885	1 25	11 06
Ft. Smith's Crossing	do	do		2, 195	1 25	27 44
Argenta	do	do		1, 295	1 25	16 19
Cabot	do	do		23, 797	1 25	297 46
Bebee	Malvern	do		218	65	1 42
Judsonia	do	do		158	65	1 03
Austin	St. Louis	Fruit		35, 695	1 25	446 19
Bebee	do	do		33, 153	1 25	414 41
Kensett	do	do		135	1 25	1 69
Judsonia	do	do		116, 786	1 25	1, 459 82
Austin	Cairo	do		465	1 25	5 81
Bebee	do	do		4, 448	1 25	55 60
Judsonia	do	do		2, 354	1 25	29 42
Newport	do	Vegetables		133	1 00	1 33
Little Rock	Malvern	Fish, fruit, vegetables and butter.		16 364	45	73 64
Do	Hoxie	Fruit		999	65	6 49
Do	St. Louis	do		416	1 25	5 20
	Little Rock.					
Judsonia	do	Vegetables, butter and fruit		278	50	9 05
				1, 531		
Malvern	Little Rock	do		601	45	2 71
Do	Texarkana	do		634	65	4 12
Do	St. Louis	do		1, 600	1 50	24 00
Do	Cairo	do		1, 501	1 50	22 51
Benton	Malvern	do		730	35	2 55
Fulton	do	Fish		707	60	4 24
Hoxie	do	Fresh meat and butter		32, 676	1 00	326 76
Austin	do	Fruit		200	50	1 00
Texarkana	Malvern	Fish and fruit		1, 165	65	7 57
Do	St. Louis.	Fruit		420	1 50	6 30
Do	Cairo	do		500	1 50	7 50
Do	Hope	do		225	45	1 01
Fulton	Texarkana	Fish		6, 950	35	24 32
Benton	do	Fruit		530	65	3 44
Austin	do	do		5, 422	1 00	54 22
Bebee	do	do		2, 675	1 25	33 44
Hoxie	Newport	Fresh meat		140	45	63
Fulton	Hope	Fish		1, 560	30	4 68
Do	Gurdon	do		1, 550	45	6 97
Do	Benton	do		100	65	65
Do	Arkadelphia	do		1, 545	50	7 73
Do	Prescott	do		1, 173	35	4 11
Prescott	Hoxie	Fruit		133	1 25	1 66
Benton	do	do		900	1 00	9 00
Bradford	do	do		735	50	3 68
Newport	do	do		300	45	1 35
Cabot	do	do		2, 457	65	15 97
Austin	do	Vegetables and fruit		3, 547	65	23 06
Bebee	do	Fruit		14, 534	65	94 47

& Southern Railway, month of May, 1884—Continued.

From what Station.	To what Station.		Class.	Weight.	RR. Rate.	Amount.
Judsonia	Hoxie	Vegetables and fruit	These rates are the Pacific Ex. Co.'s rates to public.	19,678	$0 50	$98 39
Cabot	Little Rock	Butter, eggs, and fruit		2,416	35	8 46
Austin	do	do		1,466	35	5 13
Bebee	do	Eggs and fruit		2,613	45	11 76
Judsonia	Texarkana	Fruit		200	1 25	2 50
Cabot	do	Fruit		1,135	1 00	11 35

"Returned Empties."

Rates charged by the Pacific Express Company to the Public.

St. Louis	Lutesville	3 M. T.	Egg cases			05	15
		3	do C. coops			10	30
Do	Parmly	5	do Egg cases			05	25
Do	Dexter	59	do Egg cases			05	2 95
		3	do C. coops			10	30
Do	Victoria	2	do Egg cases			05	10
Do	Newport	41	do Egg cases			05	2 05
Do	Hoxie	4	do Egg cases			05	20
Do	Austin	1	do C. coops			10	10
Fredericktown	St. Louis	25	do Beer kegs			10	2 50
Cairo	Dexter	12	do Egg cases			05	60
		10	do C. coops			10	1 00
Dexter	Cairo	8	do Beer kegs			10	80
Poplar Bluff	Harville	5	do Egg cases			05	25
Texarkana	Prescott	2	do Egg cases			05	10
De Soto	St. Louis	1	do Soda fountain		100		
	The Pacific Ex. Co. carry these empty Fountains at ½ mdse. rate 50c., which is					25	25

Cairo.....Texarkana.

On sheet No. 5 of this statement we account for 4,661 lbs. of first-class freight from Cairo to Texarkana, but since writing up said item we find that 2,100 lbs. of said freight consisted of boxed material, out of which to manufacture fruit boxes, which is third-class freight.

On the 2,100 lbs. of first-class we entered at $1.25.....$26 25
To which add 50 %..... 13 12½

$39 37½

It should be 2,100 lbs at 93c.....$19 53
Add 50 %..... 9 76½

$29 29½

Deduct amount over allowed on page 5..... $10 08

$9,516 45